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Administrative Review  
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February 3, 2004

MEMORANDUM TO: James J. Jochum  
Assistant Secretary  
for Import Administration

FROM: Holly A. Kuga  
Acting Deputy Assistant Secretary  
for Import Administration

RE: Certain Pasta from Italy (Period of Review: July 1, 2001 through June 30, 2002)

SUBJECT: Issues and Decisions for the Final Results of the Sixth Antidumping Duty Administrative Review

Summary:

We have analyzed the case briefs and rebuttal briefs submitted by interested parties. As a result of our analysis, we have made changes in the margin calculations. We recommend that you approve the positions we have developed in the Discussion of Interested Party Comments section of this memorandum. Below is the complete list of the issues in this review for which we received comments from the parties:

I. List of Comments:

**Pasta Lensi S.r.l.**

Comment 1: Clerical Error  
Comment 2: Exclusion of Sales of Pasta Produced by Other Manufacturers

**Industria Alimentare Colavita, S.p.A. and Fusco S.r.l.**

Comment 3: Clerical Error  
Comment 4: Disallowed Credit  
Comment 5: Credit Amortization

- Comment 6: Double Counted Amortization
- Comment 7: Offsetting Positive Margins
- Comment 8: Calculation of Entry Value

**PAM S.p.A.**

- Comment 9: Rescission of the Administrative Review
- Comment 10: Department's Application of Adverse Facts Available ("AFA")
- Comment 11: The Reasonableness of the AFA Rate Applied by the Department

**Pastificio Fratelli Pagani S.p.A.**

- Comment 12: Revocation

**Rummo S.p.A. Molino e Pastificio**

- Comment 13: Treatment of Rummo USA's Customer's Note Receivable as a Rebate
- Comment 14: Reimbursement of Antidumping Duties
- Comment 15: Error in the Home Market Credit Expense Calculation
- Comment 16: Inconsistencies in Rummo's Reporting of Certain Sales of Subject Merchandise
- Comment 17: Exclusion of Political Contributions from General & Administrative Expenses ("G&A") Expense Ratio

**Molino e Pastificio Tomasello S.r.l.**

- Comment 18: Incorrect Denominator Used in Calculation of U.S. Credit Expense
- Comment 19: Calculation of Packing Costs for Home Market Net Prices
- Comment 20: Calculation of DIRSEL3U for One U.S. Invoice
- Comment 21: Change in Wheat Inventory
- Comment 22: Pasta Scrap Production
- Comment 23: Cost of Goods Sold ("COGS") used in the G&A and Interest Expense Ratio Calculation
- Comment 24: Other G&A and Interest Adjustments

**Pastificio Lucio Garofalo S.p.A.**

- Comment 25: The Department Should Collapse Garofalo and Amato
- Comment 26: The Department Should Not Accept Garofalo's Definition of a Third Wheat Code
- Comment 27: Matching of Wheat Codes

- Comment 28: Subtracting DISCREBH from NETPRICOP
- Comment 29: Incorporation of Only Home Market Sales that Passed the Cost Test
- Comment 30: Revised Interest Amounts Should be Used in the Calculation of Constructed Value (“CV”)
- Comment 31: Conversion of Home Market Sales Data into Italian Lire rather than to Euros
- Comment 32: Semolina Purchases
- Comment 33: Failure to Include Commingled Sales in Garofalo’s Margin Calculation
- Comment 34: Use of Wrong Affiliated Party Arm’s Length Test
- Comment 35: Non-Use of Revised Total Cost of Manufacturing (“RTOTCOM”)

**Pastificio Zaffiri S.r.l.**

- Comment 36: Proper Matching of Zaffiri’s Sales at the Same Level of Trade (“LOT”)
- Comment 37: Calculation of Imputed Credit Expense
- Comment 38: Treatment of Piazzista Expenses
- Comment 39: Treatment of the U.S. Billing Adjustment
- Comment 40: Treatment of Free Pasta Program in the United States
- Comment 41: Currency Conversions in Computer Program
- Comment 42: Purchased Pasta
- Comment 43: By-product Revenue Offset in the COGS Denominator of the Interest Expense and G&A Expense Ratios
- Comment 44: Packing Cost in the COGS Denominator of the G&A and Interest Expense Ratios
- Comment 45: Trade Show Revenue as Offset to G&A Expense
- Comment 46: Foreign Exchange Loss
- Comment 47: Expenses on Invoice Payables and Loss on Sale of Assets
- Comment 48: Packing Costs

**Pastificio Guido Ferrara S.r.l.**

- Comment 49: Offset to Ferrara’s Depreciation for Italian Subsidies
- Comment 50: Offset to Fixed Overhead Relating to Ferrara’s Performance Bond Claim
- Comment 51: Use of “Die Type” as a Product Matching Hierarchy

II. **Background**

On August 7, 2003, the Department published the preliminary results of the sixth administrative review of the antidumping duty order on certain pasta from Italy. See Notice of Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review and Intent Not to Revoke in Part: For the Sixth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy, 68 FR 47020

(August 7, 2003) (“Preliminary Results”). On October 21, 2003, at the request of PAM S.p.A. (“PAM”), the Department held a public hearing. On November 21, 2003, the Department extended these final results until February 3, 2004. See 68 FR 65679 (November 21, 2003). The merchandise covered by this review is described in the Federal Register notice issued the same date as this memorandum. The review covers ten manufacturers/exporters. The period of review (“POR”) is July 1, 2001, through June 30, 2002. We received case/rebuttal briefs from the petitioners<sup>1</sup> and the following respondents: Pastificio Guido Ferrara S.r.l. (“Ferrara”), Pastificio Lucio Garofalo S.p.A. (“Garofalo”), Pasta Lensi S.r.l. (“Lensi”)<sup>2</sup>, Industria Alimentare Colavita, S.p.A. (“INDALCO”) and its affiliate Fusco S.r.l. (“Fusco”) (collectively “INDALCO”), PAM, Pastificio Fratelli Pagani S.p.A. (“Pagani”), Rummo S.p.A. Molino e Pastificio (“Rummo”), Molino e Pastificio Tomasello S.r.l. (“Tomasello”), and Pastificio Zaffiri S.r.l. (“Zaffiri”). We did not receive comments from Pastificio Antonio Pallante S.r.l. (“Pallante”) and its affiliate Industrie Alimentari Molisane s.r.l.

### III. Discussion of Interested Party Comments

#### **Lensi**

##### Comment 1: Clerical Error

Lensi states that the Department incorrectly deducted home market indirect selling expenses (“DINDIRSU”) and home market inventory carrying costs (“DINVCARU”) from the constructed export price (“CEP”). Lensi states that the antidumping regulations specifically preclude the Department from deducting home market expenses which only relate to the sale to an affiliated U.S. importer. Lensi argues that because there is ample evidence on the record to indicate that the selling expenses DINDIRSU and DINVCARU are unrelated to economic activity in the United States, and only relate to the sale to an affiliated U.S. importer, the Department should not deduct these expenses from the CEP for purposes of the final results.

Petitioners did not comment on this issue.

*Department’s Position:* We agree with Lensi. The expenses in the fields DINDIRSU and DINVCARU only relate to the sale to an affiliated U.S. importer, and are unrelated to economic

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<sup>1</sup> Petitioners are New World Pasta Company, Dakota Growers Pasta Company, Borden Foods Corporation and American Italian Pasta Company.

<sup>2</sup> The Department determined that Lensi was the successor-in-interest to Italian American Pasta Company Italia S.r.l. (“IAPC”), and Lensi retains the antidumping and countervailing duty deposit rates assigned to IAPC by the Department in the most recently completed antidumping and countervailing duty administrative reviews. See Notice of Final Results of Antidumping and Countervailing Duty Changed Circumstances Reviews: Certain Pasta from Italy, 68FR 41553 (July 14, 2003).

activity in the United States. Accordingly, we will correct the error in the final margin program. See Lensi's Final Calculation Memorandum, dated February 3, 2004, which is on file in the Central Records Unit ("CRU"), room B-099 of the main Commerce Department Building ("Lensi's Final Calculation Memorandum").

Comment 2: Exclusion of Sales of Pasta Produced by Other Manufacturers

Lensi states that the Department's preliminary margin calculation for Lensi did not exclude sales of pasta purchased from other manufacturers, though in the Preliminary Results, the Department stated that it had excluded sales of purchased pasta from the margin calculation. Lensi argues that the Department should modify the margin program to exclude such sales of purchased pasta.

Petitioners did not comment on this issue.

*Department's Position:* We agree with Lensi. Accordingly, we will correct the error in the final margin program. See Lensi's Final Calculation Memorandum.

**INDALCO**

Comment 3: Clerical Error

INDALCO argues that the Department made a clerical error in the part of the preliminary margin program that executes the model matching. As a result, it adds, INDALCO's product matches were made to random products without regard to matching characteristics reported for the various products. Specifically, INDALCO states that the "DIF1" field should be a 2-byte character field, instead of the 2-byte numeric field included in the margin program.

Petitioners did not comment on this issue.

*Department's Position:* The Department agrees with INDALCO that we did make a clerical error with regard to the "DIF1" field and will correct the error in the final margin program. See Indalco's Final Calculation Memorandum, dated February 3, 2004, which is on file in the CRU ("See Indalco's Final Calculation Memorandum").

Comment 4: Disallowed Credit

INDALCO states that in the Preliminary Results, the Department miscalculated the adjustment percentage associated with the disallowance of a certain portion of INDALCO's credit (see the business proprietary Memorandum To Neal M. Halper from Laurens van Houten, RE: Cost of Production and Constructed Value Adjustments, dated February 3, 2004). According to INDALCO,

after determining the disallowed portion, the Department calculated an adjustment percentage by dividing the disallowed portion of the credit by the total fixed overhead costs of subject merchandise. INDALCO argues that the credit in question relates to all products, both subject and non-subject. Therefore, INDALCO argues that the adjustment percentage should be calculated not based on the fixed overhead costs of subject merchandise only, but instead on the total fixed overhead costs of all products.

Petitioners did not comment on this issue.

*Departments position:* We agree with INDALCO that the credit in question relates to all products. Thus, for these final results, we have recalculated the adjustment percentage by dividing the disallowed portion of the credit by the total fixed overhead costs of all products. See Indalco's Final Calculation Memorandum.

#### Comment 5: Credit Amortization

INDALCO states that for the Preliminary Results, the Department adjusted Indalco's credits by amortizing them over the average lives of the related assets. According to INDALCO, the Department determined the lives of the assets based on the depreciation rates the company used in fiscal year 2001. INDALCO argues that this approach was inappropriate, however, because in a few instances the rates used in 2001 represented not the full-year depreciation, but half-year depreciation rates. According to INDALCO, like most other companies in Italy and the United States, INDALCO adopted the so-called "half-year convention" for assets in the first year of their useful lives. Furthermore, INDALCO states that the use of the half-year rates was also inappropriate because those rates were only relevant in 2001, while the full year depreciation rates were used for 2002. INDALCO argues that because it was the Department's intention to use the actual depreciation amounts for the POR, the full-year rates are the relevant ones. According to INDALCO, because the Department intended to allocate the credits over the average lives of the related assets, the full-year depreciation rates should be used because the half-year rates do not reflect the useful lives of the assets.

Petitioners did not comment on this issue.

*Department's position:* We agree with INDALCO. It was the Department's intention to allocate Indalco's credits over the average useful lives of the related assets. For the Preliminary Results we used the depreciation rates used by INDALCO to calculate its depreciation expense during 2001. Upon further examination, we found that a few of the rates we used were half-year rates instead of the full-year rates. Thus for these final results, we have adjusted our calculation to correct for this error. See Indalco's Final Calculation Memorandum.

Comment 6: Double Counted Amortization

INDALCO states that the Department adjusted two of its credits using the same adjustment methodology. However, INDALCO argues that the Department overlooked a major difference in the way these two credits were treated by the company in its financial records. While INDALCO concedes that it recognized the full amount of one credit in the year it was received, the other credit was amortized. According to INDALCO, this second credit was received in several installments, from the end of 1998 to the beginning of 2001, with each installment being amortized, starting in the year it was received, over different periods of up to five years. INDALCO notes, therefore, that the reported credit amount represented only a portion of the total credit received. INDALCO argues that for the final results, the Department should avoid double amortizing this second credit.

Petitioners did not comment on this issue.

*Department's position:* We agree with INDALCO. After reviewing the record, we found that the amount in question was only a portion of the total credit INDALCO received for fulfilling a certain agreement. The credit was received in several installments from the end of 1998 to the beginning of 2001. For these final results, we have recalculated the cost of production ("COP") so as to not double amortize this second credit. See Indalco's Final Calculation Memorandum.

Comment 7: Offsetting Positive Margins

INDALCO argues that the Department should adhere to the finding in the World Trade Organization ("WTO") Appellate Body decision in the Antidumping Duties On Imports of Cotton-Type Bed Linen From India, ("Bed Linens") WT/DS141/AB/R, dated March 1, 2001, and offset any positive margins with negative margins in the same entry.

Petitioners challenge INDALCO's assertion that the Department should change its long-standing practice of "zeroing out" negative margins. They state that Court of International Trade ("CIT") has found that the WTO panel and appellate decisions are non-binding on third parties and do not serve as precedent. Moreover, petitioners add, given that the statute is silent on the question of "zeroing" negative dumping margins, the CIT has deferred to the Department's interpretation of the statute. As a result, they maintain that the Department should not change its long-standing practice of "zeroing out" negative margins, and apply the current calculation methodology for the final margin analysis concerning INDALCO.

*Department's position:* We disagree with INDALCO and have not changed our calculations of the weighted-average dumping margin as suggested by the respondent for these final results. The Court has upheld the Department's treatment of non-dumped sales in Corus Engineering Steels Ltd. v. United States, Slip Op. 03-110 (CIT August 27, 2003), PAM, S.p.A. v. U.S., 265 F. Supp. 2d 1362, 1369

(CIT May 8, 2003) (a challenge by PAM to the final results from the fourth administrative review of this order) and The Timken Company v. United States, 240 F. Supp. 2d 1228 (CIT 2002), because our methodology is consistent with our statutory obligations under the Tariff Act of 1930, as amended (“the Act”).

Furthermore, the Federal Circuit recently affirmed the Department’s methodology. The Timken Company v. United States, Fed. Cir. No. 03-1098, 03-1238 (Fed. Cir. Jan. 16, 2004) (Decision not final as of this determination). As discussed below, we include U.S. sales that were not priced below normal value (“NV”) in the calculation of the weighted-average margin as sales with no dumping margin. The value of such sales is included in the denominator of the weighted-average margin along with the value of dumped sales. We do not, however, allow U.S. sales that were not priced below NV to offset dumping margins found on other sales.

Section 771(35)(A) of the Act defines “dumping margin” as “the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.” Section 771(35)(B) of the Act defines “weighted-average dumping margin” as “the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer.” These sections, taken together, direct the Department to aggregate all individual dumping margins, each of which is determined by the amount by which NV value exceeds export price (“EP”) or CEP, and to divide this amount by the value of all sales. The directive to determine the “aggregate dumping margins” in section 771(35)(B) of the Act makes clear that the singular “dumping margin” in section 771(35)(A) of the Act applies on a comparison-specific level, and does not itself apply on an aggregate basis. The Act does not direct the Department to factor negative price differences (i.e., the amount by which export price or CEP exceeds NV) into the calculation of the weighted-average dumping margin. In other words, the value of non-dumped sales is not permitted to cancel out the dumping margins found on other sales.

This does not mean, however, that non-dumped sales are ignored in calculating the weighted-average dumping margin. It is important to note that the weighted-average margin will reflect any non-dumped merchandise examined during the POR: the value of such sales is included in the denominator of the weighted-average dumping margin calculation, while no dumping amount for non-dumped merchandise is included in the numerator. Thus, a greater amount of non-dumped merchandise results in a lower weighted-average margin.

Furthermore, this is a reasonable means of establishing estimated duty-deposit rates in investigations and assessing duties in reviews. The deposit rate we calculate for future entries must reflect the fact that U.S. Customs and Border Protection (“CBP”) is not in a position to know which entries of subject merchandise are dumped and which are not. By spreading the liability for dumped sales across all reviewed sales, the weighted-average dumping margin allows CBP to apply this rate to all merchandise subject to review.



Finally, with respect to INDALCO's WTO specific arguments, we note that U.S. law, as implemented through the Uruguay Round Agreements Act ("URAA"), is fully consistent with our WTO obligations.

#### Comment 8: Calculation of Entry Value

Petitioners argue that the Department incorrectly calculated the entry value of pasta exported by INDALCO from Italy in the preliminary margin program. Specifically, they state that the gross unit prices charged by INDALCO to its U.S. customers were inclusive of several expenses incurred in the United States, and should have been subtracted from the entry value equation in the Department's preliminary margin program, namely: advertising, U.S. duty, and post-entry rebates.

INDALCO rebuts petitioners' claim that the Department improperly included several post-entry expenses in the entered value calculation in the preliminary margin program. It claims that the petitioners are correct that the Department should have excluded the harbor maintenance fee and the merchandise processing fee because INDALCO paid the U.S. duty, since it is the importer of record, but argues that it would be improper and contrary to settled Customs regulations and practice to subtract advertising and post-entry rebates from the entered value calculation.

*Department's Position:* We agree with petitioners and INDALCO that it is the Department's normal practice to subtract harbor maintenance and merchandise processing fees from the entered value equation when it is paid for by the producer. However, we disagree with petitioners' contention that we should subtract advertising and post-entry rebates from the aforementioned equation, because these items are not part of the entered value calculation. Therefore, for the final results we will recalculate the entered value equations by subtracting the harbor maintenance and merchandising fees. See Indalco's Final Calculation Memorandum.

#### **PAM**

#### Comment 9: Rescission of the Administrative Review

PAM argues that the Department should rescind its initiation of this review with respect to PAM because petitioners failed to serve PAM or its counsel with the requests for review. First, PAM states that the regulation governing service of review requests explicitly requires that named companies be served with review requests during the month in which the request is filed or within 10 days thereafter. See 19 CFR 351.303(f)(3)(ii). The regulation states that, "If the interested party that files the request is unable to locate a particular exporter or producer, or the petitioner, the Secretary may accept the request for review if the Secretary is satisfied that the party made a reasonable attempt to serve a copy of the request on such person." PAM claims that petitioners made no effort to locate it or its counsel, despite the fact that it had participated in two prior reviews. See Notice of Final Results of Antidumping Duty Administrative Review, Partial Rescission of Antidumping Duty Administrative

Review and Revocation of Antidumping Duty Order in Part: Certain Pasta from Italy, 67 FR 300 (January 3, 2002) (“Pasta from Italy 4<sup>th</sup> Review”); see also, Notice of Final Results of Antidumping Duty Administrative Review and Determination to Revoke the Antidumping Duty Order in Part: Certain Pasta from Italy, 65 FR 77852 (December 13, 2000) (“Pasta from Italy 3rd Review”).

PAM also argues that the Department is required to comply with its own regulations. See Vitarelli v. Seaton, 359 U.S. 535 (1959) (“Vitarelli v. Seaton”). Specifically, “an executive agency must be rigorously held to the standards by which it professes its action to be judged.” See Vitarelli v. Seaton, 359 U.S. 535, 546. PAM claims that the Department has promulgated a regulation requiring petitioners to serve respondents named in a review request, further requiring the Secretary, by negative implication, to decline to initiate the review where the petitioners have failed to obey the regulation. PAM argues in addition, that the rule is explicit, petitioners failed to follow it, and so the review was unlawfully initiated.

Furthermore, PAM claims that in the Notice of the Final Results of Administrative Antidumping Duty and New Shipper Reviews: Freshwater Crawfish Tail Meat from the People’s Republic of China, 65 FR 20948 (April 19, 2000) (“Crawfish from the People’s Republic of China”), the Department applied AFA to a respondent because the respondent failed to properly serve submissions to all interested parties despite the Department’s repeated request that the respondent serve all interested parties. PAM asserts that while in Crawfish from the People’s Republic of China, the Department punished the respondent for failure to properly serve interested parties, the Department should apply the law fairly to both petitioners and respondents in this present case and not allow petitioners to ignore the Department’s regulations without consequences.

Finally, PAM contends that had it been properly served, the company would have had an additional month to prepare its questionnaire response. Therefore, PAM argues that for these final results, the Department should rescind its initiation of this review with respect to PAM.

Petitioners disagree with PAM that the Department’s regulations require petitioners to serve a review request on each producer or exporter specified in the request. See 19 CFR 351.303(f)(3). Petitioners claim that PAM is basing its argument on an overly literal reading of the Department’s regulation which requires petitioners to serve a review request on each producer or exporter specified in the request, because the Secretary may waive this requirement if the petitioner made a reasonable attempt to serve such person. See 19 CFR 351.303(f)(3). According to petitioners, they did not serve any of the eight “producers or exporters” for whom they requested reviews directly. Petitioners, however, served counsel for four producers who participated in the immediately preceding segment, which, at the time was the most recent service list they possessed. Petitioners claim that the Department’s procedures accept service on counsel as service on the producer, notwithstanding the literal requirements of the regulations to serve the producer or exporter. The reason, petitioners contend, is that the Department is aware that counsel for any producer will generally contact other producers for whom a request is

made, in an attempt to secure representation of that producer, and that the Department does not normally send questionnaires to respondents until several weeks after initiation.

Petitioners also disagree that PAM was prejudiced by the failure to receive notice of the review. According to petitioners, PAM's counsel entered an order of appearance on the same day the questionnaire was issued, August 29, 2002, and so PAM was in no way prejudiced by failure to receive notice, and lost no time in preparing its response. See PAM's August 29, 2002 Entry of Appearance. Moreover, PAM requested at least two extensions of time for filing its original questionnaire response, and noted that the extensions would ameliorate the damage caused by late notice. See Department's Letter Granting an Extension for PAM to file its Initial Questionnaire Response, dated September 27, 2002 ("Extension to Initial Questionnaire 1"); see also Department's Letter Granting an Additional Extension for PAM to file its Initial Questionnaire Response, dated October 8, 2002 ("Extension to Initial Questionnaire 2"). As a result, PAM had over two months (*i.e.*, from August 29, 2002 through November 5, 2002) to file its initial questionnaire response. In fact, most of the respondents in this review filed responses prior to November 5, 2002. See Ferrara's Response to the Department's Questionnaire Sections A through C, dated October 21, 2002; see also Rummo's Response to the Department's Questionnaire Sections B through D, dated October 28, 2002. Thus, petitioners argue that PAM suffered no harm in not receiving a request for review and the Department should continue to apply AFA for these final results.

*Department's Position:* Section 751(a)(1) of the Act states that the Department, "if a request for such a review has been received and after publication of notice of such review in the Federal Register, shall . . . review and determine the amount of any antidumping duty." The requirements of the Act were met in this instance. On July 31, 2002, petitioners submitted to the Department their requests for review. Thereafter, on August 27, 2002, we published the notice of initiation of this antidumping duty administrative review covering the POR and listing these companies as respondents: Ferrara, Garofalo, IAPC, INDALCO, Pagani, Pallante, PAM, Rummo, Tomasello and Zaffiri. See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part, 67 FR 55000 (August 27, 2002) ("Initiation Notice"). Consequently, the statutory requirements for initiating this review were satisfied.

PAM claims, however, that petitioners' violation of section 351.303(f)(3)(iii) of the Department's regulations requires that we terminate this review with respect to it. As set forth above, nothing in the Act requires such a result nor has PAM made such a claim. Similarly, nothing in the regulations requires that we reject a request for review or terminate a review if a deficiency in service exists. The Department adopted section 351.303(f)(3)(iii) of its regulations for the orderly transaction of business. Specifically, section 351.303(f)(3)(iii) requires the party filing the request for review to personally serve the request on each producer or exporter specified in the request on the last date of the anniversary month or within ten days of filing the request, whichever is later. This regulation is designed to facilitate our administrative reviews by providing interested parties with timely notice of documents filed with the

Department and was not designed to confer important procedural benefits upon interested parties. See Taiyuan Heavy Mach. v. United States, 23 C.I.T. 701, 703-4 (CIT 1999).

Petitioners failed to serve PAM properly with the request for review. The certificate of service indicates that the petitioners relied upon the most recent public service list when serving the requests for review. However, because PAM had not participated in the most recent proceeding they were not on the most recent service list petitioners possessed. PAM claims that it was prejudiced because had it received the request for review from petitioners, it would have had an additional month to prepare its questionnaire response, *i.e.*, it was deprived of the opportunity to prepare “early” for the review. As a general matter, there is no prejudice in being denied additional time to prepare when such additional time is not specifically provided for by the statute or the regulations. More specifically, although PAM did not receive service of petitioners’ request for review, PAM was afforded two separate extensions of time to enable it to complete its questionnaire responses. PAM’s counsel entered their appearance on August 29, 2002, the same day the Department issued the questionnaire. See PAM’s August 29, 2002 Entry of Appearance. Furthermore, PAM was served with the questionnaire on the same day as the other respondents. The Department subsequently granted two extensions to PAM to file its questionnaire response, extensions that PAM claimed would ameliorate the damage caused by the late notice. See Extension to Initial Questionnaire 1; see also, Extension to Initial Questionnaire 2. Because of these extensions, PAM was one of the last companies in this review to file its questionnaire response. See PAM’s Response to the Department’s Questionnaire Sections A through D, dated November 5, 2002 (“PAM’s Questionnaire Response”). Therefore, PAM was not prejudiced by failing to have sufficient time to respond to the questionnaire in the context of this review.

The Department’s decision to continue the review despite the deficiency in service is in accordance with the law. The Supreme Court has established that, “it is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it.” See American Farm Line vs. Black Ball Freight Service, 397 U.S. 532, 539 (1970) (“American Farm Line”) quoting NLRB v. Monsanto Chemical Co., 205 F.2d 763, 764 (8<sup>th</sup> Cir. 1953). It has been established that the objective of the antidumping law is to determine current dumping margins as accurately as possible. See D&L Supply Co. v. United States, 113 F.3d 1220, 1223 (Fed. Cir. 1997). In this case, the exemption of a foreign producer from an administrative review could potentially lead to an inaccurate dumping margin and the perpetuation of an injury to the domestic industry that the statute was designed to prevent.

The Department fully expects that it will be “rigorously held to the standards by which it professes its action to be judged.” See Vitarelli v. Seaton, 359 U.S. 535, 546. Nothing in this case evidences any lapse in that regard. With respect to American Farm Lines, that case provides two situations in which a Court may require an agency to strictly obey its regulations. First, the regulation in question must be intended to confer important procedural benefits. As noted above, section 351.303(f)(3)(iii) does not convey important procedural benefits upon respondents. Rather, it provides for the orderly progress of

the administrative review. Second, the plaintiff must make a showing of substantial prejudice. See American Farm Lines, 359 U.S. at 539. Although it is true that PAM received notice later than the regulation intended, PAM suffered no prejudice as a consequence. As set forth above, the Department did not request any information from participating parties until August 29, 2002, the day it issued the questionnaire -- the same day PAM's attorney filed his appearance. Furthermore, PAM was served with the Department's request for information on the same day as the other respondents in this review. Moreover, the Department granted PAM two extensions of time which resulted in PAM having more time than any other respondent to submit its initial questionnaire response. Thus, we find that PAM has failed to demonstrate that it was prejudiced by the Department's actions.

In addition, we find PAM's reference to Crawfish from the People's Republic of China irrelevant. In that case, the Department rejected the respondents' submissions not only because they failed to properly file their questionnaire responses with interested parties, but because they also failed to submit complete and accurate responses. After requesting the respondents to re-file the questionnaire responses three times, the Department applied AFA. See Crawfish from the People's Republic of China at Comment 1.

For these final results, we have not rescinded this review with respect to PAM.

#### Comment 10: Department's Application of AFA

PAM argues that the Department erred in applying AFA with respect to PAM. According to PAM, it acted to the best of its ability but was hindered by its organizational structure and its prior counsel. First, PAM claims it has a complex organizational structure, with no fewer than seven separate entities involved in the production or distribution of pasta. According to PAM, the organizational structure is more complex than any other company in the present review, and may be the most complex of any party, to date. As a result, this made the construction and assembly of the questionnaire databases difficult. Second, PAM's interaction with the Department was mediated at all times by PAM's prior counsel. PAM claims that it provided all information requested by its former counsel and did everything in its power to ensure that its counsel had all the information needed. However, PAM argues that its former counsel was not effective in serving as a bridge between PAM and the Department. PAM claims that had it had better counsel, it would have provided anything the Department wanted. More importantly, PAM asserts that if it had been better served by counsel, PAM would not have failed verification and the Department would not have applied an AFA rate.

According to PAM, the core of the Department's application of AFA is the fact that it failed to report two-thirds of its home market sales, sixteen thousand tons of pasta to a customer for AG.E.A.<sup>3</sup>. ("AG.E.A. sales"), and five thousand tons of pasta sold from PAM's external warehouse ("FP sales").

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<sup>3</sup> AG.E.A. is an Italian government agency that supplies pasta to charitable organizations in Italy.

PAM claims that had it had better counsel, it would have noticed the discrepancy in quantity and value of home market sales reported to the Department.

Regardless, PAM argues that its inability to report two thirds of its home market sales does not warrant an AFA finding. First, PAM argues that the AG.E.A. sales are outside the ordinary course of trade. According to PAM, the Department reviewed these sales at verification and noted that these sales were to a customer who sold to AG.E.A. PAM further claims that the packing for these sales contains a label indicating the pasta was not for commercial sale. See the Department's Verification of PAM's Sales Questionnaire, dated July 28, 2003 ("PAM's Sales Verification Report") at 18 and Verification Exhibit 15. PAM claims that its other sales were to entities that subsequently resold the pasta either directly to consumers who purchased it retail or to middlemen who sold it to other customers. The AG.E.A. sales by contrast, did not permit the customer to sell the pasta to consumers, and was delivered to a government agency responsible for distribution of goods to charities. Because these AG.E.A. sales were outside the ordinary course of trade, they would not have been included in the margin calculation.

PAM claims that the only real error in all of PAM's submissions is the absence of the FP sales which were inadvertently omitted in the home market databases as result of a coding error made by a consultant. PAM does not contest the seriousness of this omission, but questions whether the application of AFA for this error is warranted.

Finally, PAM argues that the court states that a respondent showing extenuating circumstances may override an inference that a failure to provide information constituted a failure to act to the best of its ability. See Acciai Speciali Terni v. United States, 142 F. Supp. 2d 969, 993 (CIT 2001) ("Acciai Speciali Terni"). In this case, PAM suffered extenuating circumstances in that the AG.E.A. sales were outside the normal course of trade, the FP sales were omitted as a result of a programming error, and prior counsel failed to prepare PAM for verification. Therefore, for the final results, PAM argues that if the Department is to apply facts available, it should not use adverse facts available.

Petitioners disagree with PAM and argue that the Department is justified in relying on AFA for these final results. First, PAM can not apportion blame for the acknowledged deficiencies in its responses on its previous counsel, its software house, or its consultants, because the law does not recognize any distinction among these parties. It is PAM that ultimately certifies and is responsible for the accuracy and completeness of its submissions. See 19 CFR 351.303(g)(1). Further, there is no requirement that companies hire counsel, and respondents often participate on a *pro se* basis. Petitioners argue that the Department should not attempt to make judgment calls regarding responsibility for errors by an interested party and its representatives, because it is PAM that is ultimately responsible for its data and submissions.

Petitioners also argue that PAM's comments regarding its failure to report two-thirds of its home market sales are no reason for the Department to reconsider its use of AFA. Petitioners state that neither excuse provided by PAM, *i.e.*, that the unreported AG.E.A. sales are outside the ordinary course of trade because these sales were not for commercial sale and its failure to report its FP sales was a result of a coding error made by its consultant, provides any reason for the Department to reconsider its finding of AFA. According to petitioners, the Department noted that the respondents are required to report all home market sales, including sales made outside the ordinary course of trade. See Preliminary Results, 68 FR 47020, 47026. At verification, company officials stated that they thought these sales were outside the ordinary course of trade, and so intentionally excluded these sales. Id. The failure to report these sales precludes any legal analysis of the conditions of these sales, and whether they ultimately would be found to be outside the ordinary course of trade, because a full factual record on which to base such determination is lacking. Finally, petitioners state that although PAM acknowledges its failure to report its external sales, it attributes blame to its consultant or prior attorney. Petitioners argue that acceptance of such claim would permit any respondent that fails verification the luxury of firing its counsel to direct culpability away from the company. Furthermore, petitioners point out that PAM certified the accuracy and completeness of its responses. Thus, petitioners assert that any attempt to shift blame to PAM's representatives should be dismissed.

Petitioners further argue that PAM's citation of the Acciai Speciali Terni case does not support PAM's claim of extenuating circumstances. In Acciai Speciali Terni, the Department relied on AFA for unreported U.S. sales that the respondent failed to provide until a few days prior to verification, finding that respondent's submission after the relevant deadline supported the conclusion that the respondent failed to act to the best of its ability. The court upheld the Department's use of AFA, rejecting respondent's claim that the sales were "inadvertently" left out of its U.S. sales database, and asserting that the respondent never claimed that it was somehow unable to report the requested sales. Likewise, petitioners argue that PAM has not asserted that it was unable to report the requested sales. See Preliminary Results, 68 FR at 47026. Thus, PAM's failure to include these sales, whether intentional or inadvertent, supports the Department's resort to an AFA finding.

Finally, petitioners argue that the Federal Circuit recently addressed the issue of AFA. See Nippon Steel Corporation v. United States, 337 F.3d 1373, 1379-1384 (Fed. Cir. Aug. 8, 2003) ("Nippon Steel"). According to petitioners, Nippon Steel requires the Department to resort to AFA when information that has been sought by the Department has not been provided and the respondent "has failed to cooperate by not acting to the best of its ability to comply with the request of information." Nippon Steel, 337 F.3d at 1380; see also 19 U.S.C. 1677e(b). In this case, petitioners argue that the Department has objectively demonstrated that full home market sales data is required; that PAM failed to provide that information, and has made the subjective determination that PAM failed to cooperate to the best of its ability in not reporting the full universe of home market sales. As such, the Department's use of an adverse inference, pursuant to 19 U.S.C. 1677e(b) is proper, and the Department has

satisfied the only conditions precedent to use of AFA, as required by the Federal Circuit. Therefore, petitioners contend that the Department should continue to apply AFA for these final results.

*Department's Position:* As an initial matter, PAM is responsible for certifying the accuracy of all submissions filed with the Department. As stated in the Department's regulations, a representative of the company participating in a review or investigation must certify that he/she has read the attached submission, and that to the best of their knowledge, the information contained in the submission is complete and accurate. See 19 CFR 351.303(g)(1). In this review PAM certified the accuracy of all submissions. See PAM's Questionnaire Response; see also, PAM's Response to the Department's Supplemental Questionnaire, dated March 17, 2003. Thus, PAM cannot blame the acknowledged deficiencies in its responses on previous counsel, its software house, or its consultants, because PAM certified the accuracy of these submissions. Further, once counsel has entered an appearance on behalf of a company, with the exception of certifying the accuracy of information contained in a party's submission (which provision recognizes that counsel's knowledge may not be based upon first hand knowledge but rather on information made available to counsel), our regulations do not recognize a distinction between counsel and its client. See 19 CFR 351.303(g)(1) & (2). Finally, PAM participated in at least two previous reviews and was aware of the requirements associated with reporting its responses to the Department. See Pasta from Italy 4<sup>th</sup> Review; see also, Pasta from Italy 3rd Review.

The Department agrees with petitioners that we should not reconsider our findings of verification failure. On May 2, 2003, the Department issued a verification outline for PAM. In the verification outline, the Department requested that PAM prepare specific worksheets and have available certain records which the verifiers intended to use to ensure that PAM properly reported all of its home market sales of subject merchandise. See PAM's Verification Outline, dated May 2, 2003 ("PAM's Verification Outline"). In the verification outline the Department specifically informed PAM that:

(The) verification is not intended to be an opportunity for submission of new factual information. New information will be accepted at verification only when: (1) the need for that information was not evident previously; (2) the information makes minor corrections to information already on the record; or (3) the information corroborates, supports, or clarifies information already on the record.

See PAM's Verification Outline at 1.

At verification, the Department discovered that PAM failed to report two-thirds of its home market sales, the A.G.E.A. and FP sales. See PAM's Sales Verification Report at 1. We disagree with PAM that the reporting of the A.G.E.A. sales was unnecessary because they were outside the ordinary course of trade. PAM's failure to report these sales is contrary to the explicit instructions set forth in the initial questionnaire sent to PAM. See the General Instructions to the Department's August 29, 2003



Antidumping Duty Questionnaire at page G-7, number 13 (“You must report all sales, including those sales which you believe are outside the ordinary course of trade. If you claim that some sales are outside the ordinary course of trade, you should then identify those sales. You must include a complete explanation in your narrative why you consider those sales to be outside the ordinary course of trade.”) (emphasis added). See also Preliminary Results, 68 FR 47020, 47026. PAM’s failure to report the AG.E.A. sales precludes any analysis of the nature and conditions of these sales, and whether they ultimately would be found to be outside the ordinary course of trade because a full factual record on which to base such a determination is lacking. Further, we disagree with PAM that its failure to report its FP sales should be disregarded because of a coding error made by its prior counsel or consultant. As mentioned above, it is PAM that ultimately bears the burden of ensuring the accuracy of its submissions.

We also find that PAM’s citation of Acciai Speciali Terni does not support PAM’s claim of extenuating circumstances which would override our determination that PAM failed to act to the best of its ability. In Acciai Speciali Terni, the Department applied AFA to unreported U.S. sales that the respondent had failed to provide until a few days prior to verification. The court upheld the Department’s decision, rejecting respondent’s claim that the sales were “inadvertently” left out of its U.S. sales database, and asserting that the respondent never claimed that it was somehow unable to report the requested sales. Similarly, PAM has never asserted that it was unable to report the requested sales, and in fact, we discovered at verification that PAM could have reported these sales. See Preliminary Results, 68 FR 47020, 47026.

Finally, as mentioned above, the Federal Circuit recently addressed the issue of AFA. See Nippon Steel. In interpreting section 776(b) of the Act, the Federal Circuit held that “the statutory mandate that a respondent act to ‘the best of its ability’ requires the respondent to do the maximum it is able to do.” Nippon Steel, 337 F.3d at 1382.

Compliance with the ‘best of its ability’ standard is determined by assessing whether respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation. While the standard does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness or inadequate record keeping. It assumes that importers are familiar with the rules and regulations that apply to the import activities undertaken and requires that importers, to avoid a risk of an adverse inference determination in responding to Commerce’s inquiries: (a) take reasonable steps to keep and maintain full and complete records documenting the information that a reasonable importer should anticipate being called upon to produce; (b) have familiarity with all of the records it maintains in its possession, custody, or control; and (c) conduct prompt, careful, and comprehensive investigation of all relevant records that refer or relate to the imports in question to the full extent of the importers’ ability to do so.

\* \* \* \*

To conclude that an importer has not cooperated to the best of its ability and to draw an adverse inference under section 1677e(b), Commerce need only make two showings. First, it must make an objective showing that a reasonable and responsible importer would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations. (citation omitted). Second, Commerce must then make a subjective showing that the respondent under investigation not only has failed to promptly produce the requested information, but further that the failure to fully respond is the result of the respondent's lack of cooperation in either: (a) failing to keep and maintain all required records, or (b) failing to put forth its maximum efforts to investigate and obtain the requested information from its records.

Id.

There can be no doubt but that reasonable and responsible importers are aware that retention of full and complete home market sales data is required by the statute and the regulations. Full home market sales data are required because the Department's antidumping analysis is based fundamentally on an evaluation of a respondent's home market and U.S. selling practices. Thus, complete and accurate reporting of home market sales is central to determining accurate dumping margins. See Preliminary Results, 68 FR 47020, 47025.

As noted above, the Department discovered at verification that PAM had failed to report approximately two-thirds of its home market sales. We determine that PAM has not acted to the best of its ability in failing to report approximately two-thirds of its home market sales in this review, because, (1) the Department issued clear instructions requiring this information in its initial questionnaire; (2) PAM had the opportunity to provide the information in responding to two supplemental questionnaires, all of the deadlines of which were extended at PAM's request by the Department; (3) the Department had instructed PAM to report all sales, including those claimed to be outside the ordinary course of trade, and (4) PAM has successfully participated in previous reviews. Additionally, the fact that the Department was readily able to obtain general information regarding the existence of such sales at verification supports our determination that PAM did not act to the best of its ability in reporting its home market sales. Given the significant omission from its home market database, we determine that PAM failed to put forth its maximum efforts to investigate and obtain the requested information from its records. As such, the Department's use of an adverse inference, pursuant to section 776(b) of the Act, is proper. Therefore, for these final results, the Department will continue to apply AFA with respect to PAM.

Comment 11: The Reasonableness of the AFA Rate Applied by the Department

PAM argues that even if the Department's selection of AFA with regard to PAM was correct, the margin selected by the Department is unlawful because it is uncorroborated and not reasonably related to PAM's current situation. First, PAM states that the Department relies on World Finer Foods, Inc. v. United States, 120 F. Supp. 2d 1131, 1134, (CIT November 3, 2000) ("World Finer Foods 2"), to support its selection of a 45.49 percent AFA margin. Although the court upheld this rate, the time has long passed since the Department could lawfully select the highest rate from a previous review and apply it to a given respondent. According to PAM, the court in World Finer Foods Inc v. United States, No. 99-03-00138, slip op. 2000-72 (CIT June 26, 2000) ("World Finer Foods 1") required the Department to conduct a thorough analysis of the information on the record before selecting its rate. Specifically, in World Finer Foods 2, the court reviewed the remand result of the application of AFA for the respondent, Barilla. On remand in World Finer Foods 1, the Department had calculated three margins for Barilla, 39.63 percent, 60.09 percent, and 63.36 percent, and the Department applied, as AFA, the highest of these margins. The court disagreed, and required the Department to use the average of these three rates, 45.49 percent (the current AFA rate). See World Finer Foods 2, 120 F. Supp at 1132. In support of its decision, the court stated that the Department shall determine a margin that, although adverse, bears some rational relationship to the current level of dumping in the industry. See World Finer Foods 2, at 120 F. Supp at 1132. PAM argues that the Department should continue to use this analysis for these final results by reviewing information already on the record and select a rate that is more reasonable to the current situation. Specifically, PAM notes that it has never been a high margin exporter in the past. See Pasta from Italy 4<sup>th</sup> Review; see also, Pasta from Italy 3rd Review.

Finally, PAM argues that if the Department is going to apply a facts available rate, adverse or not, it should use the databases already submitted on the record. According to PAM, the Department has already verified the accuracy of the U.S. sales database. See PAM's Sales Verification Report at 24. In addition, PAM's COP databases have been through a full scrutiny and the Department elected not to conduct a verification. There are no suggestions that PAM's COP databases are flawed. Regarding the home market sales, the Department could use the databases on the record and make adjustments for errors discovered at verification. Therefore, if the Department is to apply a facts available rate with respect to PAM, the Department should use information already on the record to calculate a margin which would be more realistic than 45.49 percent.

Petitioners disagree with PAM and argue that the Department should not use any of PAM's data on the record to construct an AFA margin. Specifically, petitioners take issue with PAM's claim that World Finer Foods 2 requires the Department to recalculate an AFA margin for PAM because the AFA margin of 45.49 percent rate is not rationally related to PAM. First, petitioners state that there is no way the Department can construct an AFA margin using PAM's databases because the databases do not take into account fully two-thirds of PAM's home market sales. Thus, there is no way to establish

normal value using PAM's data, as sales indicative of higher margins may be the very sales that were not reported. Moreover, the inability to conduct a cost test means that below-cost sales cannot be removed from the few home market sales reported.

Petitioners also disagree with PAM regarding the relevance of PAM not being a high margin exporter. According to petitioners, even PAM recognizes that each review segment stands on its own. Further, PAM's previous margin provides no indication of what its current, calculated margin would be had it fully cooperated. Therefore, the Department should continue to rely on an AFA rate of 45.49 percent for PAM for these final results.

*Department's Position:* Section 776©) of the Act provides that when the Department selects from among the facts otherwise available and relies on "secondary information," the Department shall, to the extent practicable, corroborate that information from independent sources reasonably at the Department's disposal. The Statement of Administrative Action ("SAA") states that to corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information to be used. However, unlike other types of information, such as input costs or selling expenses, there are no independent sources for calculated dumping margins. The only source for margins is administrative determinations. Thus, in an administrative review, if the Department chooses as total AFA calculated dumping margin from a prior segment of the proceeding, it is not to question the reliability of the margin for that time period. See Grain-Oriented Electrical Steel from Italy: Preliminary Results of Antidumping Duty Administrative Review, 61 FR 36551, 36552 (July 11, 1996). With respect to the relevance aspect of corroboration, however, the Department will consider information reasonably at its disposal to determine whether a margin continues to have relevance. Where circumstances indicate that the selected margin is not appropriate as AFA, the Department will disregard that margin and determine an appropriate margin.

In assigning an AFA rate in an administrative review, the Department's practice is to use the highest rate given to any respondent in any segment of the proceeding. See e.g. Final Results of Antidumping Duty Administrative Review: Brass Sheet and Strip from Germany, 64 FR 43342 (August 10, 1999). After the litigation relating to the first administrative review, the highest rate given to a respondent in this proceeding is the 71.49 percent rate assigned to Pagani. The court did not address the appropriateness of this rate for Pagani because Pagani did not challenge the Department with respect to those final results. The only other company to receive a facts available rate was De Cecco in the less than fair value ("LTFV") investigation. For De Cecco, we chose a simple average of the margins calculated in the petition, which ranged from 21.85 percent to 71.49 percent, as adjusted by the Department: 46.67 percent. See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Pasta from Italy, 61 FR 1344, 1345 (January 19, 1996). De Cecco filed suit and the Federal Circuit affirmed the CIT's rejection of the 46.67 percent rate as "discredited and uncorroborated" on the record of the LTFV investigation. See F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. the United States, 216 F. Supp.3d 1027, 1032-33 (Fed. Cir. June 16, 2000).

In World Finer Foods 1, the court rejected the 71.49 percent rate with respect to the Arrighi and Barilla, and the court required the Department to conduct a thorough analysis of the information available. In World Finer Foods 2, the CIT examined the three rates calculated for Barilla, 39.63 percent, 60.09 percent, and 63.36 percent, and the average of these three rates, 45.49 percent, that the Department proposed using as AFA. The court posed the question of whether the 45.49 percent rate assigned to Barilla was properly corroborated so that it bore some rational relationship to the probability of dumping. See World Finer Foods 2, at 9; see also, World Finer Foods 1, at 9. The court was aware of the self-selective nature of reviews for companies with low rates and of the falling average-unit values from the investigation to the first review, and in upholding the Department, considered that these factors were taken into account by the 45.49 percent rate. See World Finer Foods 2, at 8-9. This rate was subsequently assessed against Barilla in the fourth administrative review as a consequence of Barilla's failure to respond to the Department's questionnaire.

Although we prefer to use the highest rate given to a company in the course of the proceeding as the basis for an AFA rate, we are cognizant of the legal history of this case and the court's rejection of the 71.49 percent rate with respect to Arrighi and Barilla and the 46.67 percent rate with respect to De Cecco. The 45.49 percent rate assigned to Barilla during the first and fourth administrative reviews is the highest rate upheld by the court. See Pasta from Italy 4<sup>th</sup> Review.

As we noted in the Preliminary Results, 68 FR at 47027, the Department previously has disregarded the highest margin in a case as best information available (the predecessor to facts available) where the highest margin was based on another company's uncharacteristic business expense which resulted in a high margin. See Fresh Cut Flowers from Mexico: Final Results of Antidumping Administrative Review, 61 FR 6812 (February 22, 1996). The Department also does not apply a margin that has been discredited. See D & L Supply Co. v. United States, 113 F.3d 1220, 1221 (Fed. Cir. 1997) (the Department will not use a margin that has been judicially invalidated); see also, Borden Inc. v. United States, 4 F Supp. 2d 1221, 1246-48 (CIT 1998) (the Department may not use an uncorroborated petition margin that is high when compared to calculated margins for the period of review). None of these unusual circumstances are present in this case. Accordingly, for PAM we have resorted to AFA and have used the highest margin (45.49 percent) upheld in this proceeding as the margin for these final results because there is no evidence on the record indicating that such a margin is not appropriate as AFA.

In considering the appropriateness of the 45.49 percent rate as an AFA rate for PAM in the current administrative review, we must consider whether the rate has probative value, i.e., is relevant and reliable. We are mindful that the 45.49 percent rate is based upon data from the first and fourth administrative reviews. However, we do not consider data from the fourth administrative review to be so outdated as to warrant rejecting said data because only a few years have passed between the fourth administrative review and this review. See Pasta from Italy 4<sup>th</sup> Review. Moreover, in the current

review, we have found individual sales transactions of other respondents during the POR at or above 45.49 percent. See company-specific final calculation memoranda, on file in the CRU. Thus, it is reasonable to conclude that the 45.49 percent rate is still relevant to the level of dumping during the POR.

Section 782(e) of the Act provides that the Department should not decline to consider information submitted by an interested party that is necessary to the determination but does not meet all of the applicable requirements if, the information is submitted by the deadline, it can be verified, it is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination, the interested party has demonstrated that it acted to the best of its ability and the information can be used without undue difficulty.

As discussed above, PAM's failure to report two-thirds of its home market sales renders its home market database unusable. Moreover, with respect to the limited number of home market sales that PAM did report, we agree with petitioners that the Department cannot construct an AFA or FA margin using PAM's home market database as submitted on the record. PAM reported only one-third of its home market sales, such that the databases on the record do not take into account fully two-thirds of PAM's home market sales. See PAM's Sales Verification Report at 3. Therefore, the Department's ability to calculate a margin using the data reported by PAM has been severely compromised. Such a small sample may not provide a reasonable approximation of PAM's actual sales practice in the home market. Not only may these sales not be representative, but any allocated expenses calculated by PAM for these sales are incorrect, because allocated expenses are calculated by dividing the total expenditure on a particular item by total sales. As PAM's total sales figure is incorrect, all of PAM's allocated expenses, including expenses such as direct and indirect selling expenses, in the home market are significantly overstated. There is also the possibility that sales indicative of a higher margin may be the very sales that were not reported. Finally, the Department discovered at verification that PAM failed to support portions of the control numbers for its home market. Therefore, it would be unduly difficult to establish a normal value using PAM's home market data.

With respect to PAM's contention that the Department should use its U.S. database, the Department discovered at verification that PAM failed to support portions of the control numbers necessary for matching purposes and failed to report a number of expenses (e.g., DBROKU, ADVERTU) correctly in the U.S. market. See PAM's Sales Verification Report at 3. These errors in reporting in combination with PAM's failure to report two-thirds of its home market database have resulted in the Department's inability to use PAM's U.S. database without undue difficulty. Although we recognize that certain minor data deficiencies may be the norm in antidumping cases, the absence of two-thirds of the home market data, combined with errors in the U.S. data exceed the norm. In light of the interrelationship between elements in a dumping analysis, and the degree of difficulty that would be incurred to use PAM's U.S. database to calculate a dumping margin in accordance with the statute, the Department is not using PAM's databases to construct a margin.

Further, there is no relevance to PAM's claiming not to be a high margin exporter in establishing an AFA rate because each review stands on its own. PAM's previous margins<sup>4</sup> provide no indication of what its current calculated margin would be had it fully cooperated. Lacking two-thirds of PAM's home market sales makes it difficult not only to determine its NV but what its selling practices were in this POR.

### **Pagani**

#### **Comment 12: Revocation**

Petitioners agree with the Department's preliminary determination that Pagani has not shipped commercial quantities of subject merchandise in the past three review periods. They state that this determination is supported by the lack of sales quantities during the fourth and fifth reviews of this order. Furthermore, they state that the Department correctly determined, in the Preliminary Results of this proceeding, that Pagani did not make sales in commercial quantities during the fourth and fifth review periods, and that those sales do not provide any meaningful information concerning Pagani's normal commercial practice.

Petitioners also note that because the Department affirmatively found that Pagani circumvented the antidumping duty order, specifically in the fourth review period, the Department should not consider Pagani's zero margin during that review period for purposes of revocation. See Anti-Circumvention Inquiry of the Antidumping and Countervailing Duty Orders on Certain Pasta From Italy: Affirmative Final Determinations of Circumventions of the Antidumping and Countervailing Duty Orders, 68 FR 54888 (September 19, 2003). They claim further, that it would be patently unfair for the Department to credit Pagani for a period when Pagani was actively circumventing the order.

Finally, petitioners urge the Department to inform Pagani that if it wants to be considered for revocation, it, inter alia, must sell subject merchandise at not less than NV in the United States for at least three consecutive years, beginning with the seventh administrative review period.

Pagani states that petitioners appear to agree that Pagani exported commercial quantities of subject pasta to the United States in the sixth administrative review. Pagani bases its argument on the fact that petitioners stated that Pagani did not make sales to the United States in commercial quantities during the fourth and fifth administrative reviews, but failed to assert that sales during the sixth administrative review were insufficient to constitute a commercial quantity. However, Pagani disagrees with petitioners that Pagani was circumventing the order. It argues that petitioners provide no support for their assertion. Finally, Pagani contests petitioners' assertion that for Pagani to be considered for

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<sup>4</sup> In Pasta from Italy 3rd Review, PAM received an antidumping rate of 5.04 percent and in Pasta from Italy 4<sup>th</sup> Review, it received a rate of 4.10 percent.

revocation it must sell subject merchandise in commercial quantities starting with the seventh review period. They argue that such argument is without foundation and the Department would be in error if it acceded to petitioners' request.

*Department's Position:* In the Preliminary Results, the Department determined not to revoke the antidumping order with respect to Pagani for the reasons specified therein. See Preliminary Results, 68 FR 47030. We find no evidence to contradict our findings in the Preliminary Results, and therefore, our decision not to revoke the order with respect to Pagani has not changed. Furthermore, parties' comments concerning the seventh review do not apply to this segment of the proceeding and, thus, have not been addressed in this memorandum.

### **Rummo**

#### Comment 13: Treatment of Rummo USA's Customer's Notes Receivable as a Rebate

Petitioners allege that the record lacks sufficient information to analyze the status of a notes receivable from one of Rummo USA's customers, which was listed on Rummo USA's financial statement. Petitioners claim that although the Department requested information on this outstanding asset and reviewed it during verification, neither Rummo nor the Department fully described the transactions affecting the outstanding balance of the loan. Petitioners further assert that Rummo has withheld pertinent information. They allege that the Department should consider any repayment of the principal of this loan as a rebate and allocate the amount of the repayment to all sales made during the POR from the customer.

Rummo disagrees with petitioners' claim that Rummo USA's customer's repayment of its loan to Rummo USA constitutes a rebate on sales to a customer of subject pasta during the POR. Specifically, Rummo observes that the terms of the promissory note require that the principal of the loan be repaid in monthly installments and that it must be repaid until the loan is retired. Rummo disagrees with certain terminology that the Department used in its verification report where it discussed the change in value of the loan. In addition, Rummo disagrees with petitioners' assertion that Rummo did not provide the requested information to the Department. Rummo contends that it did, in fact, answer the Department's supplemental and verification questions regarding this loan. Furthermore, Rummo takes issue with petitioners' attempt to tie the loan to certain purchases of subject pasta. Rummo states that there is no record evidence to tie the value change to either: purchases of any product, purchases of non-bulk pasta, purchases of non-bulk pasta sold in the United States, or purchases of bulk pasta sold in the United States, during the POR. Rather, it claims that record evidence demonstrates that the loan was provided in 1998 and shows no link between the customer and its purchase of subject pasta during this review.



Lastly, Rummo disagrees with petitioners' recommendation of treating the value change as a rebate, stating that petitioners have not cited any precedent which justifies treating such an activity as a rebate. Rummo emphasizes that the Department, as described in the standard antidumping questionnaire, treats rebates as direct adjustments to sales and that a change in the value of a loan is not a refund of monies paid, a credit against monies due on future purchases, or a conveyance of an item of value by the seller to the buyer. Rummo claims that the repayment of the loan is not a rebate and therefore should not be treated as one for these final results.

*Department's Position:* We disagree with petitioners' allegation that the record does not contain sufficient evidence to analyze the loan held by Rummo USA's customer. As Rummo noted, the record contains the terms of the promissory note as well as Rummo's response to the Department's supplemental questions regarding the promissory note. Based on our analysis of this information, and absent evidence in support of petitioners' conclusion that we should allocate as a rebate the amount of the notes receivable, we agree with Rummo's rebuttal argument that the loan should not be treated as a rebate. Therefore, we have not changed our decision and continue to treat the value change of the notes receivable as a loan.

#### Comment 14: Reimbursement of Antidumping Duties

Petitioners allege that Rummo reimbursed a U.S. customer for antidumping duties. Petitioners refer to the Preliminary Results where under 19 CFR 351.402(f)(2), importers must file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during the POR and that failure to comply with this requirement could result in the assessment of double antidumping duties. Petitioners assert that neither Rummo nor this U.S. customer filed such a certificate. Furthermore, petitioners claim that Rummo's questionnaire response and statements made at verification indicate that Rummo made payments to a U.S. customer that constitute reimbursement of antidumping duties. Specifically, petitioners reference a notes receivable from this U.S. customer on which petitioners claim Rummo USA applied antidumping duty refunds to the loan principal. Petitioners state that Rummo should have explained the basis for the loan made to the U.S. customer, and that neither Rummo nor its U.S. customer filed a certificate of antidumping duty reimbursement as required under section 351.402(f) of the Department's regulations. Petitioners urge the Department to penalize Rummo for failing to comply with 19 CFR 351.402(f).

Rummo disagrees with petitioners' allegation that it reimbursed antidumping duties to one of Rummo USA's customers. Rummo explains that the customer holding the outstanding loan to Rummo USA did not act as the importer of record for any sales from Rummo S.p.A. during the POR. Rummo also claims that any violation under 19 CFR 351.402(f) would occur if the customer received reimbursement for antidumping duties and was the importer of record; Rummo firmly states that this is not the case. Furthermore, Rummo contends that Rummo reported Rummo USA as the importer of record for every sale in the U.S. sales database, and that 19 CFR 351.402(f) is not applicable to

petitioners' allegation as Rummo USA's customer was not the importer of record. In addition, Rummo explains that the promissory note does not discuss the payment of antidumping duties on behalf of the customer or the reimbursement of antidumping duties to the customer, as petitioners have alleged. Further, Rummo notes that in calculating EP or CEP, the Department is to deduct the amount of any antidumping duty as the exporter, Rummo, paid directly on behalf of the importer, Rummo USA, or reimbursed the importer, Rummo USA, and not the customer, which petitioners have alleged. Therefore, Rummo concludes that no payments made to Rummo U.S.A.'s customer could be considered as a reimbursement of antidumping duties.

*Department's Position:* We disagree with petitioners' allegation that Rummo's U.S. customer failed to file a certificate regarding the reimbursement of antidumping duties, pursuant to 19 CFR 351.402(f)(2), and thus should be penalized. 19 CFR 351.402(f)(2) states, in pertinent part, that "the importer must file a certificate" prior to liquidation of entries. We find that Rummo USA was the importer of record for all sales made to the United States during the POR. The activity between Rummo USA and its customer is not the subject of the certification criteria set forth under 19 CFR 351.402(f). Furthermore, these entries have not yet been liquidated. As such, even were we to find that a certificate is required, the time for filing such a certificate has not expired. Thus, the Department will not presume that Rummo paid or reimbursed the antidumping duties, as stated in 19 CFR 351.402(f)(3).

#### Comment 15: Error in the Home Market Credit Expense Calculations

Petitioners allege that the Department incorrectly calculated the home market credit expenses ("CREDITH") for sales in which Rummo had not yet received payments. Specifically, petitioners claim that the Department misplaced a closing parentheses, and thus the calculation did not properly calculate the date which would have been multiplied by the interest rate. Furthermore, petitioners claim that this error resulted in an unrealistically long credit period and an enormous credit expense for the affected home market sales. In addition, this error generated negative net home market prices. Therefore, petitioners assert that the Department should correct this error.

Rummo did not comment of this issue.

*Department's Position:* The Department agrees with petitioners' allegation that there was an error in calculating the CREDITH for certain sales in the preliminary margin calculation. Therefore, we are correcting this error for the final margin calculations. See Rummo's Final Calculation Memorandum, dated February 3, 2004, which is on file in the CRU ("Rummo's Final Calculation Memorandum").

#### Comment 16: Inconsistencies in Rummo's Reporting of Certain Sales of Subject Merchandise

Petitioners allege that the Department excluded sales of pasta made by other manufacturers from the preliminary margin analysis, while not relying on Rummo's reported costs for purchased pasta in the cost test. Petitioners note that the Department included certain sales of a specific control number in the preliminary margin analysis which did not have the respective COP. Petitioners claim that Rummo failed to report the COP data. Petitioners assert that the inconsistency of this data resulted in all of the particular pasta control number ("CONNUM") products passing the COP test. Petitioners urge the Department to resort to partial facts available in regards to all pasta sales with the specified CONNUM, and to exclude all sales under this control number, as these sales were below the COP or because these sales were produced by other Italian pasta manufacturers.

Rummo disagrees with petitioners' assertion that the Department should apply partial facts available to certain sales of subject merchandise that were below COP or were produced by other Italian pasta manufacturers. Rummo claims that all home market sales of the specific CONNUM were sales of pasta produced by other Italian pasta manufacturers. Rummo asserts that it did not fail to report Rummo's COP for these sales, as alleged by petitioners. In addition, Rummo points out that the information submitted to the Department regarding Rummo's COP was fully verified. Rummo does agree with petitioners that for the final results, the Department should exclude home market sales of the specified control number from the margin analysis.

*Department's Position:* The Department agrees with both petitioners and respondents that we should exclude all sales under the specific CONNUM in question from the final margin program. However, we disagree with petitioners that the use of partial facts available is warranted. Rummo did not meet any of the requirements necessary to invoke the use of facts available, as outlined in section 776(a) of the Act. Specifically, Rummo did not withhold any information from the Department, fail to provide such information by the deadline, significantly impede this proceeding, or provide information that could not be verified. Furthermore, the Department confirmed during verification that the CONNUM in question was produced by another manufacturer. As a result, the Department should have employed its practice of excluding pasta produced by other manufacturers when performing the margin calculations. For the final results, we will adjust the margin program to exclude this CONNUM. See Rummo's Final Calculation Memorandum.

#### Comment 17: Exclusion of Political Contributions from G&A Expense Ratio

In the Preliminary Results of this review, Rummo argues that the Department erroneously included political contributions in the numerator of the G&A expense ratio. Referring to section 782(d) of the Act, as amended, Rummo asserts that the Department failed to retrieve sufficient information about this expense either through questionnaire responses or verification steps. Rummo questions why the Department excluded taxes from previous financial years, an extraordinary cost, from the G&A expense ratio but included political contributions. For the final results, Rummo states that the Department should exclude political contributions from the numerator in the G&A expense ratio

because the Department failed to provide adequate justification as to why it was appropriate to include this cost.

Petitioners assert that Rummo's argument should be rejected for three reasons. First, petitioners state that section 782(d) of the Act relates to notices of deficiencies in responses where the Department may resort to facts available. Petitioners explain that the Department simply recalculated Rummo's G&A expense ratio and did not rely on facts available. Second, petitioners note that Rummo failed to present a viable argument why political contributions should be excluded from the G&A expense ratio. Third, petitioners argue that it is common for companies to make donations or contributions as part of their general operations. Moreover, these contributions are not unusual in nature or infrequent in occurrence. Therefore, petitioners claim that the Department correctly classified political contributions as a general operating expense which should be included in G&A expense.

*Department's Position:* Although Rummo improperly excluded political contributions from reported costs, because the Department was in possession of the relevant information, the Department was able to remedy the reporting error without requesting that Rummo re-submit its response.

In addition, the Department's decision to exclude taxes from the previous financial years is not relevant in determining whether political contributions relate to the general operations of a company.

Contributions, whether political or otherwise, are a general expense of a company. Contributions are a part of the overall administrative operations of a company and are attributable to all production. See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from France, 64 FR 30820 (June 8, 1999) (Comment 22). Therefore, for the final results, we will continue to include the contributions in the numerator of the G&A expense ratio.

### **Tomasello**

#### **Comment 18: Incorrect Denominator Used in Calculation of U.S. Credit Expense**

Tomasello states that the Department made a clerical error by dividing Tomasello's reported interest rate by 36 instead of 360 when recalculating the imputed credit expense for U.S. sales.

Petitioners did not comment on this issue.

*Department's Position:* We agree with the Tomasello. Accordingly, we will correct the error in the final margin program. See Tomasello's Final Calculation Memorandum, dated February 3, 2004 which is on file in the CRU ("Tomasello's Final Calculation Memorandum").

#### **Comment 19: Calculation of Packing Costs for Home Market Net Prices**

Tomasello states that the Department recalculated Tomasello's reported packing to include additional film and carton costs, but did not adjust home market net prices to reflect those additional costs. Tomasello states that because packing is deducted in the calculation in lines 144 and 150 of the Department's Preliminary Margin Calculation SAS log ("Tomasello's SAS log"), the additional packing costs calculated by the Department must also be deducted. Tomasello states that the Department apparently attempted to adjust for the additional packing costs, as evidenced by the calculation in lines 229 and 230 of Tomasello's SAS log, but actually added instead of subtracted the costs. Tomasello states that the Department should correct this error in its final margin calculations.

Petitioners did not comment on this issue.

*Department's Position:* We agree with the Tomasello. Accordingly, we will correct the error in the final margin program. See Tomasello's Final Calculation Memorandum.

#### Comment 20: Calculation of DIRSEL3U for One U.S. Invoice

Tomasello states that the Department incorrectly calculated DIRSEL3U for one U.S. invoice by setting DIRSELU for that invoice equal to a factor, but treating it as a per-unit amount, which overstates the margin for all sales on that invoice. Tomasello requests that the Department recalculate DIRSELU.

Petitioners did not comment on this issue.

*Department's Position:* We agree with Tomasello. Accordingly, we have corrected Tomasello's margin program. See Tomasello's Final Calculation Memorandum.

#### Comment 21: Change in Wheat Inventory

Tomasello contends that the Department incorrectly imputed an inventory adjustment when calculating the cost of wheat used in the production of semolina. Tomasello states that it did not have an actual value for its wheat inventory at the beginning or the end of the POR; therefore, any amount imputed by the Department would be completely theoretical and arbitrary in nature. Tomasello points out that using these theoretical inventory values contradicts the Department's statement in the cost verification report against using theoretical data. Tomasello claims that the method it used in the submissions to compute wheat costs avoided imputing theoretical costs by considering the physical purchase of wheat during the POR, similar to a replacement cost methodology. Tomasello referenced antidumping duty investigations and reviews of certain pasta from Turkey. Furthermore, Tomasello contends that because it only records year-end inventory values of wheat in its books and records, and because those books and records are prepared in accordance with Italian generally accepted accounting principles ("GAAP"), the Department should not modify its semolina mill cost by the net change in inventory value.

Petitioners state that Tomasello's comparison of the facts in the instant case to the replacement cost methodology routinely used in Turkish pasta cases is wrong, because the Department's replacement costing methodology is only used in hyper-inflationary economies, where the effects of inflation distort historical costing methods. Petitioners note that in the instant case, Italy is not a hyper-inflationary economy where historical costing methods are distorted. Furthermore, petitioners contend that basic accounting theory dictates that raw materials used in the cost of goods manufactured is equal to the beginning inventory of raw materials, plus purchases, less ending inventory. If the beginning and ending inventory of raw materials is not considered, the total costs incurred during the period are not properly accounted for in the cost of goods manufactured. Furthermore, petitioners state that according to section 773(f)(1)(A) of the Act, the Department will rely on the home country's GAAP so long as those principles reasonably reflect the costs associated with the production and sale of the merchandise. Petitioners contend that in this case, Tomasello's normal books and records failed to assign a cost to the beginning wheat inventory which resulted in understated raw material costs. Because of the understatement in costs, the Department must depart from Tomasello's normal books and records to determine the costs of raw materials.

*Department's Position:* We disagree with Tomasello's assertion that the Department should not include a cost associated with the change in beginning and ending wheat inventory during the POR. As the petitioners point out, section 773(f)(1)(A) of the Act states that the Department will rely on the respondent's books and records in accordance with its home country GAAP so long as they reasonably reflect the costs associated with the production and sale of the merchandise. In the instant case, Tomasello's normal books and records did not assign a value to its inventory. Thus, the costs submitted to the Department did not reflect any costs associated with the wheat inventory consumed during the POR. The Department was able to verify the quantities of wheat on hand at the beginning and at the end of the POR. As such, for the Preliminary Results, the Department calculated a cost associated with the change in wheat inventories by using the average per-unit price of wheat (including transportation costs) purchased during the POR.

Furthermore, Tomasello's comparison of the current case with the pasta from Turkey proceedings is misplaced. In the instant case, the issue is whether it is reasonable to assign no costs to raw materials consumed out of the beginning inventory. Replacement costing, which is normally used in high inflationary economy cases, deals with using the current month's per-unit cost of materials purchases for valuing the same month's actual quantity of materials consumed. As we do not consider it reasonable to assign zero costs to raw material inventory consumed in production, for these final results, we continue to include in the COP an amount associated with the wheat consumed from inventory during the POR.

Comment 22: Pasta Scrap Production

Tomasello claims that for the Preliminary Results, the Department failed to account for the semolina used in the production of scrap pasta. Tomasello points out that pasta scrap utilizes semolina, and therefore, it must be accounted for in the semolina usage calculation. Tomasello states that the Department should subtract the semolina used in the production of scrap pasta from the total semolina used to produce the finished merchandise.

Petitioners state that Tomasello's argument is incorrect because the Department did consider the revenue from pasta scraps in calculating the cost of wheat used in production in the Preliminary Results. Petitioners claim that if Tomasello's proposed adjustment were made, it would improperly double count the affect of pasta scrap sales.

*Department's Position:* We disagree with Tomasello's assertion that the Department failed to account for the semolina used in the production of scrap pasta. Consistent with Tomasello's reported costs, the Department treated scrap pasta as a by-product of the pasta production process. Where the Department determines a product to be a by-product, it allocates all common production costs to the primary merchandise and subtracts the amount of the revenue from the sale of by-products from the total cost of manufacturing ("COM") of the chief product (see Final Determination of Sales at Less Than Fair Value: Oil Country Tubular Goods From Argentina 60 FR 33539, 33547 (June 28,1995) ("OCTG From Argentina"). As the petitioners note, the Department, in the July 31, 2003, Cost of Production and Constructed Value Adjustment Memorandum for the Preliminary Results, already deducted the revenue from the sale of scrap pasta when it calculated the cost of semolina used in production. The Department used the net cost of wheat purchased, as reported by Tomasello in its cost verification exhibit 14, which had treated the sale of pasta scraps as an offset (*i.e.*, the cost of the wheat had already been reduced by the income generated from the sales of pasta scraps). Tomasello's proposed treatment would have the Department continue to offset the cost of wheat by the income generated from the sales of pasta scraps and then allocate the net cost of wheat over the quantity of finished pasta and scrap pasta produced. This treatment would, in effect, be double-counting the impact of scrap pasta on the reported costs. Because the issue involves the treatment of scrap, the appropriate treatment, as explained in OCTG From Argentina, is to reduce the total pool of input costs by the revenue generated by the sale of scrap and then allocate the net costs over the quantity of finished goods produced.

#### Comment 23: COGS used in the G&A and Interest Expense Ratio Calculation

Tomasello states that the Department should not reduce the COGS used in the denominator of the G&A and interest expense ratio calculations by the by-product sales revenue. Tomasello states that the COGS is simply a figure from the financial statements and should only be adjusted by packing costs. Furthermore, Tomasello claims that there is no precedent for the Department to remove by-product revenue from the COGS denominator and, in hyper-inflationary and non-market economies, the

Department will not know how much by-product to deduct. Tomasello asserts that to be consistent with other cases, the Department should not adjust the COGS denominator for by-product revenue.

However, Tomasello contends that if the Department continues to reduce the COGS by the by-product sales revenue, the offset must be synchronized with the offset actually taken in the mill cost calculation. Tomasello states that because the mill cost is based on POR costs and the COGS used in the denominator is based on year-end financial statements, the by-product offset will not match Euro for Euro, however, the same by-product revenue accounts should be used in both calculations. Specifically, Tomasello claims that because the Department did not accept the remacinato sales (sales of re-ground durum wheat, a by-product) as an offset of mill costs, this account should not be subtracted from the COGS used in the denominator of the G&A and interest calculation.

Petitioners state that Tomasello wants to subtract the by-product revenue for the POR from the fiscal year 2001 COGS used in the G&A and interest expense rate calculation. Petitioners argue that the Department should reject Tomasello's argument because it cannot mix values from two different periods.

*Department's Position:* We disagree with Tomasello. The G&A and interest expense ratios must have a COGS denominator which is calculated in the same manner as the COM to which it is applied. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Pasta From Italy, 61 FR 30326, 30356 (June 14, 1996), Notice of Final Determination of Sales at Less Than Fair Value Live: Cattle From Canada, 64 FR 56739, 56756 (October 21, 1999), and Notice of Final Results of Antidumping Duty Administrative Review: Elemental Sulphur from Canada, 64 FR 37737, 37740 (July 13, 1999). Tomasello's reported direct material costs in the COM are net of the scrap revenue offset; therefore, the COGS used in the denominator of the G&A and interest expense ratios must also be net of the offset. Tomasello's comparison of this review to investigations involving high inflationary economies is not compelling. In the current review, sufficient financial information is available to adjust the COGS denominator to ensure that it is on the same basis as the COM to which the G&A and interest rates will be applied.

While we agree with Tomasello that the by-product offset to the COGS used in the denominator of the G&A and interest expense rate calculations should include the same general ledger accounts used to offset the COM calculation, we disagree that an error was made "synchronizing" the offset in the instant case. Tomasello appears confused with its calculation of semolina costs from cost verification exhibit 14. In the Preliminary Results Cost Calculation Memo, the Department used the net cost of wheat purchased, as reported by Tomasello, which had already been reduced by by-product sales revenues and pasta scrap revenue. For these final results, we continue to reduce the COGS denominator for the G&A and interest expense rate calculation by the corresponding amounts from the year-end trial balance.



Comment 24: Other G&A and Interest Adjustments

Tomasello states that Department should not include in the G&A expense rate calculation the write-offs of prior years' deferrals that were booked in Tomasello's extraordinary expense account. In addition, Tomasello claims that the Department should not include interest on long-term loan deferrals in the interest expense rate calculation. Tomasello asserts that the insurance deferrals were unrelated to activity in the current year, the accounts receivable and accounts payable discrepancies relate to differences between the booked amounts and the collected or paid amounts in prior years, and the interest expense was from deferred interest due on loans in prior periods. Lastly, Tomasello claims that the loss on sale of capital assets is of a character materially different from Tomasello's normal business activity of producing pasta and should be excluded from the G&A expense rate calculation.

Tomasello submits that in the Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From The Netherlands, 67 FR 62112 (October 3, 2002) ("Carbon Steel Flat Products"), the Department found that it was not appropriate to reduce current period costs by a reversal relating to a prior period estimate. Therefore, according to Tomasello, expenses incurred but not recognized in a prior period which are carried forward to the current period are extraordinary expenses, and should be excluded from the G&A and interest expense rate calculations.

Petitioners argue that in order for an expense to be considered an extraordinary expense it must be unusual in nature and infrequent in occurrence. Petitioners state that the items classified by Tomasello are neither unusual in nature nor infrequent in occurrence. Petitioners point out that the expenses listed by Tomasello are incurred by businesses on a fairly frequent basis. Furthermore, petitioners state that because these expenses were recognized as expense items in the 2001 financial statements, for the year ending in 2001, they should be included in Tomasello's G&A and interest expense ratio calculations.

*Department's Position:* We disagree with Tomasello that the financial statement items labeled "extraordinary" should be excluded from the G&A and interest expense rate calculations. While the Department does allow for the exclusion of extraordinary expenses under certain circumstances, insurance expenses, technical assistance fees, subscription expenses, vehicle repairs, accounts payable and accounts receivable discrepancies, and the loss on the sale of capital assets do not fall within these circumstances. The Department normally will exclude costs considered extraordinary, provided that they are both unusual in nature and infrequent in occurrence. See Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan, 64 FR 24329 (May 6, 1999) ("Hot-Rolled Products from Japan"). The expenses in question cannot be considered infrequent in occurrence or unusual in nature as they are all normal costs of operating a business. Tomasello's claim that these costs are unrelated to the current year does not change the fact that these costs are neither infrequent in occurrence nor unusual in nature. We also disagree with Tomasello that these costs are unrelated to the current period. Accounts payable discrepancies, for example, relate to differences between amounts booked as payable to vendors versus amounts actually

paid. This difference is not known or quantifiable until the discrepancy is settled. It is at this time that the amount is recorded by the company. Even though the account payable in question may have been established in a prior year, the discrepancy was not known or quantifiable until the current year. We disagree that these costs should be ignored as they relate to the general operations of the company for the current year.

We also disagree with Tomasello's characterization of the insurance expenses, technical assistance fees, subscription expenses, and vehicle repair expenses as being prior period costs. While the company may have paid these costs in prior years, it capitalized such costs, deferring them to future periods. Companies often defer expenses when they consider such costs to relate to future periods. The accrual basis of accounting operates on such principles (*i.e.*, matching the cost with the time period in which the benefit occurs). This is why Tomasello recognized such costs in the current period. As such, we consider these costs to be related to the general operations of the company for the current year and have included the costs in the G&A rate calculation for these final results.

Lastly, we disagree with Tomasello that the loss on sale of capital assets should be excluded from the G&A expense rate calculation. Contrary to Tomasello's position, we did not include the loss on sale of capital assets in the G&A rate calculation because we thought it was in the business of selling fixed assets. We included the loss because the loss arose as a result of the company disposing of capital assets that were related to its general production operations. As we stated in Hot-Rolled Products from Japan, we consider the disposition of fixed assets to be a normal part of a company's operations. As such, any gain or loss realized on the routine disposition of production assets relates to the general operations of the company as a whole and should be included in the G&A rate calculation. Finally, in the case cited by Tomasello, Carbon Steel Flat Products, the respondent was able to substantiate that its extraordinary charge related to a prior year and to a division unrelated to the production of the subject merchandise; thus, we excluded it from the G&A calculation. Therefore, we are not making changes to the G&A expense rate calculation, as requested by Tomasello.

### **Garofalo**

#### **Comment 25: The Department Should Collapse Garofalo and Amato**

Petitioners argue that Garofalo and Amato both should have submitted section A responses, as they are affiliated producers. Petitioners argue that because the Department found that Garofalo and Amato were affiliated in a previous review, a questionnaire, sent to Garofalo, required a consolidated response. See Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke in Part 68 FR 6882 (February 11, 2003) ("Pasta from Italy 5th Review"). See also the Department's August 29, 2002 questionnaire. In addition, petitioners state that the Department required this consolidated information so that it could determine whether to collapse Garofalo and Amato in this review. In arguing that the Department should collapse the two companies, petitioners

refer to arguments from the public version of their brief filed in the CIT in New World Pasta Co. v. U.S., Ct. No. 03-00105. See Petitioners' September 24, 2003 Case Brief at Attachment 1.

Garofalo agrees with the Department's decision not to collapse Garofalo's and Amato's data in the Preliminary Results and Pasta from Italy 5th Review. See Preliminary Results, 68 FR at 47022 and accompanying Issues and Decision Memorandum, at comment "Affiliation between Garofalo and Amato." Specifically, Garofalo argues that while it provided substantial new factual information on the record of the current review, the facts on the record in this review do not differ meaningfully from the facts on the record in the prior administrative review. Thus, Garofalo contends that the Department in the Preliminary Results correctly relied on the same analysis from the previous review. Moreover, respondent notes that it is the Department's practice to adhere to its prior decisions in the absence of a "reasoned analysis" explaining the necessity of a change, and as there is no new information, the Department should not change its finding from the Preliminary Results.

Garofalo also argues that the Department should not address the CIT case brief attached in support of petitioners' arguments as the Department already made its decision with respect to the fifth review, and should not revisit that here. Furthermore, Garofalo insists that, unless and until the CIT overturns the Department's final results from the previous review, the Department should continue to find that Garofalo and Amato's data should not be collapsed.

*Department's Position:* As set forth in the Preliminary Results, we preliminarily found that Garofalo and Amato were affiliated pursuant to section 771(33) of the Act, but that there was no common control, and consequently, a significant potential to manipulate products or prices did not exist to justify collapsing the two companies. See Preliminary Results, 68 FR 47022-23. In making this finding we adopted our analysis in its entirety from the immediately preceding review. Id.; see Petitioners' November 5, 2002 Submission, Attachment 1, July 31, 2002 Memorandum to Melissa G. Skinner, Director, Office of AD/CVD Enforcement VI, "Whether to Collapse Garofalo and Amato in the Preliminary Results" ("Garofalo Collapsing Memo"), the public and proprietary versions of which are on file in the CRU; see also Pasta from Italy 5<sup>th</sup> Review at Comment 6 "Affiliation between Garofalo and Amato."

We have no basis upon which to change this finding. Contrary to petitioners' position, Garofalo provided all of the information requested by the Department pertaining to this issue. See Garofalo's October 21, 2002 questionnaire response, pages A-8 through A-14 and Garofalo's March 25, 2003 questionnaire response, pages 9-21. In addition, petitioners have provided no new information or argument on the relationship between Garofalo and Amato, nor has the Department discovered new information during the course of this review. Consequently, the Department's analysis adopted in the Preliminary Results, and used in the previous review, will continue to be adopted in its entirety. See 68 FR 47022-23. For the reasons set forth in the Garofalo Collapsing Memo, the Department determines that Garofalo and Amato are affiliated pursuant to section 771(33) of the Act and 19 CFR 351.102(a),

but lack common control, so that a significant potential to manipulate products or prices does not exist. Therefore, it is not appropriate to collapse the two companies under 19 CFR 351.401(f).

With respect to Garofalo's argument that we should not address the portions of the CIT brief attached by petitioners, we note that the petitioners attachment of the argument section from its CIT brief is not a practice that the Department encourages. As a general matter, given the factual differences from one review to another, such an attachment may contain information not relevant to the review being conducted and, thus, be subject to rejection by the Department. However, as we state above, with respect to this particular issue there was no new information or argument between the previous review and this review.

Comment 26: The Department Should Not Accept Garofalo's Definition of a Third Wheat Code

Petitioners disagree with the Department's acceptance of Garofalo's third wheat code in the Preliminary Results, and request that we disregard this third wheat code in the final results. Petitioners disagree with Garofalo's additional wheat code for two reasons. First, petitioners allege that the Department's practice is to base its model matching criteria on the similarity of physical characteristics as opposed to costs. Petitioners add that when examining physical characteristics, the Department chooses only those that are commercially significant. Petitioners assert that Garofalo's wheat code modification is not based on commercially significant physical characteristics. Petitioners' argument is predicated on their statement that the Department, in its initial questionnaire, laid out the four characteristics used for model matching and defined the types of codes used to delineate these characteristics. They contend that Garofalo's additional wheat code is simply a sub-division of the category for 100 percent durum wheat, as opposed to a new category that would merit a new code. Specifically, petitioners argue that there is no evidence on the record which indicates that the different wheat types identified by Garofalo result in different physical characteristics in pasta or that customers request these various wheat types. They allege that the only basis for subdividing the wheat code is the cost difference between these types of wheat. In addition, they note that the fact that none of the other Italian pasta producers reported a similar distinction serves as further support that this distinction is not commercially significant.

Further, petitioners argue that the Department must keep the definition of the "foreign like product" consistent across all parties within the same proceeding. Specifically, they contend that if Garofalo's proposed changes to the "foreign like product" definition are important enough to be included, this change must be consistently applied to each respondent. As the other respondents have not raised this issue, petitioners conclude that the Department should not use Garofalo's wheat code in the final results calculation.

Garofalo contends that the Department, in writing its initial questionnaire, intentionally allowed for the possibility of additional categories. Garofalo maintains that by adding an additional wheat category, it

did exactly what the Department envisioned. Garofalo notes that in the supplemental questionnaire, Garofalo provided evidence of the difference the quality of semolina makes in the finished pasta product, as well as the cost differences associated with the different qualities. Also, while the Department must make model matching determinations based on commercially significant qualities, petitioners are incorrect that cost and price are not factors in such determinations.

Garofalo argues that it has reported wheat codes consistent with the methodology accepted in the last review, and that petitioners have not raised any new facts or arguments which warrant a different finding in this review. Garofalo cites to the original investigation where the Department considered semolina quality differences to be an “appropriate” criterion for product matching. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Pasta From Italy, 61 FR 30326, 30346 (June 14, 1996) (“Pasta: Final Determination”). In addition, Garofalo contends that the actions of other respondents pertaining to this issue do not support petitioners’ argument. There are many reasons, including lack of accounting data or the non-use of this semolina, which Garofalo claims might explain why other respondents did not report their data in a similar manner. Garofalo refers to the investigation where the Department allowed three respondents to report semolina quality as a model match, even though other respondents did not do so. See Pasta: Final Determination, 64 FR at 30346.

Garofalo further refutes petitioners’ contention, noting that merely adding a category to one of the model matching criteria does not constitute redefining the “foreign like product.” Moreover, Garofalo adds that even if it was redefining the foreign like product, the Department allows foreign like products specific to each company. Id.

*Department's Position:* We agree with Garofalo that the reporting of additional wheat types enables a more accurate model matching. Garofalo is also correct that in the absence of new facts or new arguments, the Department does not revisit previous determinations. Furthermore, we continue to find that cost and pricing information is informative in determining whether a proposed modification to a product characteristic is commercially significant. However, we agree with petitioners that the most important factor in this determination is the physical differences between the types of wheat.

The Department previously determined that the second type of semolina defined by Garofalo is an acceptable wheat type category. Although the Department used Garofalo's third wheat type category in our preliminary results margin calculation, we have since reconsidered our usage of this wheat type. The third type of semolina reported by Garofalo is merely a blend of the two already accepted by the Department. As such, the Department is not persuaded that this new type results in a new category with physical characteristics that are different, in a commercially significant way, from the two categories previously defined, nor does it enable more accurate model matching. Thus, we are not including this wheat type in the calculation of these final results, and all sales with a wheat code of 3 have been changed to sales with a wheat code of 1, the wheat which makes up the largest percentage of the blended wheat type.

Comment 27: Matching of Wheat Codes

Garofalo alleges that the Department did not properly match U.S. sales of wheat code 3 to the proper home market sales and should make this correction for the final results. Garofalo claims that the Department did not state that it intended on matching U.S. wheat code 3 to home market wheat code 2 and that based on the most similar characteristics, the Department should therefore match U.S. wheat code 3 to home market wheat code 1.

Petitioners refute Garofalo's allegation that the Department improperly matched Garofalo's wheat code 3 by stating that Garofalo should have coded all of its sales with a wheat code of 1. Petitioners further disagree with Garofalo's alteration of the sequence codes for "shape" arguing that the Department should not allow Garofalo to subdivide wheat codes and manipulate the sequence of the sub-codes. Petitioners reiterate their argument that the Department's acceptance of the wheat code subdivision is not in accordance with the statute and should therefore be reversed for the final results. See Comment 26, above.

*Department's Position:* We determined that Garofalo's wheat code 3 is not acceptable for the purposes of this review, as stated in Comment 26, above. Therefore, it is unnecessary to address Garofalo's argument regarding matching of wheat codes.

Comment 28: Subtracting DISCREBH from NETPRICOP

Petitioners argue that the Department incorrectly failed to deduct the sum of discounts, rebates and price adjustments when calculating the net price used for the purposes of the cost test. They argue that this mistake overstates the net home market prices which were compared to Garofalo's cost of production.

Garofalo did not comment on this issue.

*Department's Position:* We agree with petitioners. Pursuant to 19 CFR 351.401(c), the Department will make price adjustments that are "reasonably attributable to the ... foreign like product." Therefore we have corrected this error for the final results. See "Final Results Calculation Memorandum - Pastificio Lucio Garofalo," dated February 3, 2004, which is on file in the CRU ("Garofalo's Final Calculation Memo").

Comment 29: Incorporation of Only Home Market Sales that Passed the Cost Test

Petitioners argue that the Department incorrectly included all of Garofalo's home market sales for comparison purposes in the preliminary margin analysis program. They state that as Garofalo was

subject to a cost test, its sales that did not pass the cost test should not have been used for comparison with U.S. sales.

Garofalo did not comment on this issue.

*Department's Position:* We agree with petitioners. Pursuant to 19 CFR 351.406(a), the Department may "disregard sales of the foreign like product made at prices that are less than the cost of production," where these sales account for more than twenty percent of the sales of a CONNUM. Therefore, we have corrected this error for the final results. See Garofalo's Final Calculation Memo.

Comment 30: Revised Interest Amounts Should Be Used in the Calculation of CV

Petitioners argue that the Department did not use recalculated interest amounts in the computer field RINTEX in the preliminary margin analysis program.

Garofalo did not comment on this issue.

*Department's Position:* We agree with petitioners. Pursuant to the "Preliminary Results Calculation Memorandum - Pastificio Ludio Garofalo," dated July 31, 2003 which is on file in the CRU ("Garofalo's Preliminary Calculation Memo"), we revised the financial expense ratio resulting in a revised interest expense. This revised expense should have been used in the calculation of the Preliminary Results. Therefore, we have corrected this error for the final results. See Garofalo's Final Calculation Memo.

Comment 31: Conversion of Home Market Sales Data into Italian Lire rather than into Euros

Garofalo claims that the Department erroneously converted home market sales, used for the sales-below-cost test, from Euros into Lire. Garofalo reported its sales data in both Euros and Lire and reported its cost data entirely in Lire. Garofalo asserts that the Department should have first converted the cost file data into Euros and then converted the 2001 home market sales from Lire to Euros. Garofalo notes further that because the official currency in Italy changed from Lire to Euros during the POR, effective January 1, 2002, the Department should use the official currency for the review. Moreover, Garofalo claims that the Department used different conversion methodologies for other companies participating in the same proceeding. Therefore, Garofalo urges the Department to first convert Garofalo's cost data into Euros, and then convert the lire-denominated home market sales into Euros for the sales-below-cost test.

Petitioners rebut Garofalo's currency conversion argument by noting that Garofalo reported its cost and sales for the first half of the POR in Lire. In addition, petitioners argue that the Department should not employ a double-conversion methodology. Specifically, the Department should not have to convert

both cost and sales data into Euros, when some of the data is already reported in Lire. Moreover, petitioners refute Garofalo's argument that the Department used a different methodology for another company participating in the same proceeding, by noting that the other company reported its cost of production in Euros for this administrative review. Thus, the Department did not have to conduct a currency conversion for the other company; and, therefore, does not need to change the methodology used in calculating Garofalo's preliminary margin calculation.

*Department's Position:* We agree with petitioners that no currency conversion changes are necessary for these final results. Garofalo reported its cost database in Lire. See Garofalo's January 27, 2003 questionnaire response at page D-1. The other companies to which Garofalo refers reported their cost databases in Euros. Therefore, our treatment of Garofalo was responsive to the data circumstances specific to Garofalo. As Garofalo's sales data was submitted both in Euros and Lire, the Department determined that it was simpler to convert only some of the sales data into Lire than to convert some sales data and all cost data into Euros. In addition, as of January 1999, the exchange rate between the Euro and Lire was fixed, so the choice of currency should have no impact on Garofalo's rate. Therefore, we did not change the methodology used in calculating Garofalo's margin calculation.

#### Comment 32: Semolina Purchases

Garofalo argues that the transfer price paid for semolina purchased from its affiliated supplier occurred at a market price. Garofalo states that evidence presented showed that the semolina price charged by one of its affiliated suppliers was comparable to prices charged by its unaffiliated suppliers. However, according to Garofalo, the Department erroneously compared the affiliated supplier price to the average semolina purchase price of all of its unaffiliated suppliers.

Petitioners argue that Garofalo purchased the majority of its semolina from unaffiliated suppliers at a price higher than the transfer price paid to its affiliated supplier. Petitioners contend that the comparison of the transfer price paid to its affiliate to the average market price is correct. They further contend that the use of any benchmark other than the average market price would be statistically unrepresentative of Garofalo's actual purchases, thus defeating the purpose of the arm's length test. Petitioners note that it is the authority of the Department to determine how best to test whether an input purchased from an affiliate occurred at arm's length. Petitioners argue further that the evidence on the record supports that semolina is the major input in the production of pasta. Petitioners agree with the adjustment made by the Department for the preliminary results and add that the Department should continue to apply the same adjustment for the final results.

*Department's Position:* In determining whether an input is considered "major" in accordance with section 773(f)(3) of the Act, among other factors, the Department considers both the percentage of the input obtained from affiliated suppliers (versus unaffiliated suppliers) and the percentage the individual element represents of the product's total cost of manufacturing. We relied on this methodology in the



Final Determination of Sales at Less Fair Value: Certain Hot-Rolled Flat -Rolled Carbon Quality Steel Products from Brazil, 64 FR 38756 (July 19, 1999). In the current case, Garofalo purchased semolina from its affiliate. While semolina is significant with respect to the total cost of manufacturing pasta, we have determined that the quantity and value of semolina purchased during the POR from the affiliate is not significant enough to be considered a major input in accordance with section 773(f)(3) of the Act.

Nonetheless, pursuant to section 773(f)(2) of the Act, the Department may disregard the transfer price from an affiliated supplier if it is less than the market price for the same input. Consistent with past practice, we consider the price paid by Garofalo to its unaffiliated suppliers of semolina in Italy to be reflective of market prices and more accurately representative of Garofalo's purchases. Therefore, we continue to use the weighted-average of these prices as the benchmark. We compared the average transfer price of semolina purchased from Garofalo's affiliated suppliers to this benchmark and determine that the benchmark price is higher than the price Garofalo paid to its affiliated suppliers for semolina. Therefore, for the final results, we adjusted the cost of semolina obtained from affiliates to reflect a market price.

#### Comment 33: Failure to Include Commingled Sales in Garofalo's Margin Calculation

Garofalo claims that in the Preliminary Results the Department stated that it intended to include sales of commingled purchased pasta in the margin calculation, but failed to do so. See 68 FR at 47028. Garofalo urges the Department to correct this inadvertent error and include commingled sales in the margin calculation for the final results.

Petitioners assert that it is the Department's policy to exclude respondent's sales of pasta made by unaffiliated producers of the subject merchandise from respondent's margin analysis. See Notice of Preliminary Determination of Sales at Less than Fair Value and Postponement of Final Determination: Certain Pasta from Italy, 61 FR 1344, 1348 (January 19, 1996). They further claim that Garofalo did not provide sufficient information to determine the percentage of sales that covered merchandise produced by Garofalo and classified as commingled sales, as opposed to sales covering purchases from unaffiliated manufacturers. Petitioners agree with the Department's exclusion of these sales from the margin calculation and urge the Department to continue this practice for the final margin calculation.

*Department's Position:* We agree with Garofalo. When pasta purchases from an unaffiliated supplier cannot be separately identified for sales purposes by the respondent (so-called "commingled" pasta), the Department's practice is to include these sales in the margin calculation program. See Preliminary Results see also, Notice of Final Results of Antidumping Duty Administrative Review, Partial Rescission of Antidumping Duty Administrative Review and Revocation of Antidumping Duty Order in Part: Certain Pasta from Italy, 65 FR 7349, 7356 (February 14, 2000) ("Pasta from Italy 2<sup>nd</sup> Review"). Further, our questionnaire specifically states that when it is not possible to identify the pasta supplier for a specific sale of pasta, please state "COMMINGLED" or provide an appropriate code in the

manufacturing field. See Department's Initial Questionnaire to Garofalo, dated April 29, 2002 at V-2. In Garofalo's supplemental response, it identified "COMMINGLED" sales. See Garofalo's response to the Department's Supplemental Questionnaire, dated April 25, 2002. Therefore, for these final results, we are including sales of commingled pasta in Garofalo's margin calculation program. See Garofalo's Final Calculation Memo.

Comment 34: Use of Wrong Affiliated Party Arm's Length Test

Garofalo alleges that the Department applied the wrong affiliated party test program, in which it excluded sales of affiliated customers whose sales are outside the 98 - 102 percent band as compared to sales to unaffiliated customers. Garofalo notes that in the Notice of Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade, 67 FR 69186, 69197 (November 15, 2002), the Department stated that the new methodology will be applied to all investigations and reviews initiated on or after November 23, 2002, and the instant review was initiated August 27, 2002. See Initiation Notice, 67 FR 55000. Thus, Garofalo concludes that the Department should not apply the new methodology; rather, the Department should use the methodology which excludes affiliated home market customers' sales from the normal value calculation only if sales to such customers, on average, are less than 99.5 percent of the selling price to unaffiliated home market customers.

Petitioners agree with Garofalo's assertion that the Department should exclude home market sales to affiliated parties at prices less than 99.5 percent of the prices to unaffiliated customers, as this review was initiated prior to the date when the Department modified the test.

*Department's Position:* We agree with both Garofalo and petitioners that the affiliated party test program used is not applicable to this case. Therefore, we have corrected this error in the final results. See Garofalo's Final Calculation Memorandum.

Comment 35: Non-Use of RTOTCOM

Garofalo states that while the Department adjusted the total cost of manufacture ("TCOM"), it used the unadjusted variable cost of manufacture from the home market ("VCOMH") dataset in computing Garofalo's margin. Garofalo argues that the Department should use the RTOTCOM in computing the VCOMH in the margin calculation program.

Petitioners argue that the Department should reject Garofalo's proposed change to only home market variable costs. They state that the Department's preliminary computer program also used the unadjusted variable cost of manufacture for U.S. sales ("VCOMU") in the margin calculation program. They further argue that the use of the unadjusted variable cost of manufacturing ("VCOM") for both the U.S. and home market sales will yield the same difference in merchandise ("DIFMER"), just as if the

adjusted VCOMH and VCOMU were used. Therefore the Department should reject Garofalo's proposed change to the preliminary margin calculation.

*Department's Position:* We agree with Garofalo. An unrevised VCOMH was inadvertently used in the calculation of the DIFMER variable. We have corrected this error for these final results. We disagree with petitioners' argument that we should not make any adjustment because VCOMU was also unrevised and therefore the comparison between VCOMH and VCOMU would not change. Although petitioners are correct that when VCOMU is initially referenced it is the unrevised VCOMU, in line 680 VCOMU is redefined as the revised VCOMU. See Garofalo's Preliminary Calculation Memo, Attachment 2. Therefore, for these final results, we are not making any changes to the VCOMU variable for the purposes of the DIFMER calculation.

### **Zaffiri**

#### Comment 36: Proper Matching of Zaffiri's Sales at the Same LOT

Zaffiri argues that the Department should not have collapsed Zaffiri's home market levels of trade into a single level and should not have matched U.S. sales to Zaffiri's full home market database.

Zaffiri states that its small customer group in the home market purchases small amounts of pasta, such that the amount of pasta on one U.S. invoice is equal to that of fifty sales to its small customer group. By comparison, its large customer group in the home market purchases larger amounts of pasta per invoice, such that the amount of pasta on one U.S. invoice is equal to that of five sales to its large customer group. Zaffiri argues that the difference in the kilograms per invoice between the small customer group and the large customer group translates into a difference in the effort required to sell a given quantity of pasta, with the small customer group requiring more effort. Zaffiri argues that this increased effort for the small customer group compels the conclusion that there is a LOT difference between the small customer group and the large customer group, and that only the large customer group should be compared to U.S. customers.

Zaffiri also states that the small customer group falls at a different point in the chain of distribution because it sells directly to small groceries, which normally buy from wholesalers or distributors. Zaffiri argues that it absorbs additional responsibilities typically carried out by a wholesaler or distributor, and claims that Zaffiri's sales to the small customer group are therefore made at a different LOT from the sales to the large customer group and sales to the United States.

Finally, Zaffiri argues that its pricing structure shows that its small customer group is at a different LOT because the small customer group does not receive rebates and pays a higher average net price per kilogram than its large customer group.

Zaffiri cites Import Administration Policy Bulletin Bumber 92/1, "Matching at Levels of Trade," (July 29, 1992) and Pasta from Italy 2<sup>nd</sup> Review to support its position that customer categories with different selling activities are at different LOTs. Zaffiri also cites Pasta from Italy 3<sup>rd</sup> Review, 65 FR at 77854 to support its position that sales at a different point in the chain of distribution can indicate an LOT difference.

Zaffiri argues that if the Department finds it necessary to match U.S. sales to sales from its small customer group in the home market, the Department should apply an LOT adjustment equal to the difference in average net price between the large customer group and the small customer group.

Petitioners state that Zaffiri's arguments do not provide a basis for a finding of two separate LOTs in the home market, and argue that the Department should continue to match Zaffiri's EP sales to its sales in Italy without regard to the LOT. Petitioners state that Zaffiri's argument that the difference in quantity of individual sales between the small and large customer groups translates into a difference in the level of effort involved in selling a given quantity of pasta does not constitute a difference in LOT. Petitioners argue that the LOT evaluation is based on the selling functions provided by Zaffiri, and state that Zaffiri provides the same selling functions (freight arrangement, delivery, warranty, technical advice) to all of its customers in Italy. Petitioners cite the SAA at 830, to support their assertion that Zaffiri's reliance on the quantity involved in individual sales is not a proper basis for a claim of different LOTs in the home market.

Regarding Zaffiri's argument that its small customer group falls at a different point in the chain of distribution because most small groceries typically purchase pasta from wholesalers or distributors rather than directly from the producer, petitioners state that Zaffiri submitted no evidence that it provided different selling functions to its claimed different LOTs. Petitioners cite to the SAA at 829 to support its claim that Zaffiri's line of reasoning should be rejected by the Department.

In response to Zaffiri's claim of structural differences in pricing between its small and large customer groups, petitioners claim that Zaffiri's argument does not warrant a finding of different LOTs, because Zaffiri did not submit information that demonstrates that the difference in average net price per kilogram is a result of different selling functions provided by Zaffiri. Petitioners state that Zaffiri's comments indicate that the difference may be attributable to the quantities purchased, rather than differences in Zaffiri's selling functions.

*Department's Position:* We agree with petitioners. A difference in quantity of individual sales between small and large customer groups does not translate into a difference in the selling functions (e.g., freight arrangement, delivery, warranty, technical advice) performed by Zaffiri for its customer groups. An LOT analysis is based on the selling functions provided by Zaffiri to its various customer groups. See section 773(a)(7)(A) of the Act. The record shows that Zaffiri provides the same selling functions at similar activity levels to all of its customers in Italy. Further, Zaffiri's reliance on the quantity

involved in individual sales is not a proper basis for a claim of different LOTs in the home market and does not constitute a difference in LOT. Specifically, the Department should ensure that a percentage difference in the price is not more appropriately attributable to differences in the quantities purchased in individual sales (see SAA at 830).

Additionally, with regard to Zaffiri's argument that its small customer group falls at a different point in the chain of distribution, Zaffiri states that when its sales involve distributors or wholesalers, its decrease in sales transactions per kilogram sold constitutes a difference in the LOT. However, Zaffiri has submitted no evidence that it provided significantly different selling functions to its customers within different chains of distribution and a difference in the selling functions is the primary determinant for LOT analyses. Additionally, for the Department's purposes, it is not sufficient that a producer only make nominal reference to a company/customer category as a "wholesaler" to find a difference in the LOT (see SAA at 829).

Regarding Zaffiri's claim of structural differences in pricing between its small and large customer groups, Zaffiri has not submitted information demonstrating that the difference in average net price per kilogram is a result of the different selling functions it provides its customers. Zaffiri's arguments focus on the difference that is attributable to the quantities purchased, rather than differences in its selling functions. Thus, because Zaffiri provides the same selling functions at similar activity levels to all of its customers in Italy, for these final results, we find that the slight differences in Zaffiri's selling functions do not warrant a finding of different LOTs. Finally, because Zaffiri's arguments do not provide a sufficient basis for a finding of two separate LOTs in its home market, we will continue to match Zaffiri's EP sales to its sales in Italy without regard to level of trade.

#### Comment 37: Calculation of Imputed Credit Expense

Petitioners claim that the Department went against its stated practice of using a published commercial short-term lending rate in the absence of short-term borrowing in the currency of the sales transaction by allowing Zaffiri to use the average interest rate its bank charges on its overdrafts to calculate its reported imputed credit expenses on its home market sales.

Petitioners state that Zaffiri's use of the interest rate on its overdrafts is not consistent with the Department's policy because it is not based on publicly available information, the rate is not reasonable in that an overdraft rate is a punitive rate intended to discourage customers from overdrawing their accounts, and because Zaffiri's overdraft interest rate differs significantly from the interest rates reported by other respondents in this administrative review. Petitioners also argue that Zaffiri's use of its overdraft interest rate is not representative of usual commercial behavior, because it is not a normal commercial practice to overdraw on accounts each time a company makes a purchase.

Petitioners state that a recent court case confirms that the Department may not accept a respondent's surrogate interest rate without matching the surrogate rate selected to the creditworthiness of the company under investigation.<sup>5</sup> Petitioners state that the Department should follow its stated practice by substituting a publicly-available interest rate, such as, a rate published by the International Monetary Fund ("IMF") for its final analysis of Zaffiri.

Zaffiri claims that the interest rate used is the short-term interest rate actually incurred by Zaffiri during the POR, as verified by the Department. Zaffiri claims that it, like almost all respondents in this review, uses bank overdrafts as its usual means of short-term financing, because most Italian companies do not use short-term loans for operating capital purposes; rather, they have a line of credit from their bank(s) which permits them to overdraw their working bank accounts for a short time. Zaffiri states that this overdraft is then subject to a short-term interest rate, which is the company's interest expense as recorded in their accounting records. For these reasons, Zaffiri states that petitioners err in their claim that Zaffiri relies on a surrogate interest rate.

Zaffiri also states that petitioners err in claiming that the use of overdrafts for short-term financing does not constitute usual commercial behavior. Zaffiri argues that this practice is typical for the Italian pasta sector. Zaffiri notes that other pasta respondents in this current review and previous reviews have used overdraft rates as the measure of short-term interest rates when the respondent has no short-term loans in the POR, a methodology that was accepted by the Department and not subject to objection by any party. Zaffiri argues that its use of overdraft rates as the interest rate for purposes of the calculation of its imputed credit expenses is correct, and the Department should continue to use its reported CREDITH for purposes of the final results.

*Department's position:* We agree with Zaffiri. The interest rate that Zaffiri reported reflects the short-term interest expense it actually incurred in its Euro borrowings (i.e., a line of credit which is used to avoid overdraft penalties) and as recorded in its accounting records during the POR. Additionally, Zaffiri reported its actual borrowing expense as requested in the Department's August 29, 2002, questionnaire<sup>6</sup>. Further, there is nothing on the record to suggest that Zaffiri's line of credit, which is associated with the bank account it uses in the normal course of business, is an inappropriate measure of its short-term home market borrowing. Thus, we have no means to disregard the actual interest rates applicable to Zaffiri's short-term interest expense during the POR. Therefore, for purposes of the

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<sup>5</sup> Petitioners cite Maui Pineapple, Co. Ltd. V. United States, Slip Op. 03-42 (CIT Apr. 17, 2003) and the Department's June 16, 2003, Remand Redetermination in Maui Pineapple Co., Ltd. V. United States, Court No. 01-03-01017 at 2-9.

<sup>6</sup> See, FIELD NUMBER 31.0: Credit Expenses CREDITH  
"Report the unit cost of credit computed at the actual cost of short-term debt borrowed by your company in the foreign market. If you did not borrow short-term during the period of review, use a published commercial short-term lending rate. . . ."

final results, we will continue to use the short term interest rates that are applicable to Zaffiri's line of credit to derive the interest rate for the calculation of its imputed credit expense.

Comment 38: The Treatment of Piazzista Expenses

Petitioners argue that the Department's classification of the salary and other compensation of Zaffiri's piazzista (traveling salesman) as direct selling expenses was incorrect, and should be re-classified as indirect selling expenses. Petitioners state that Zaffiri reported, and the Department verified, that the piazzista is an employee of Zaffiri, and that his salary, pension contributions, worker's compensation and severance indemnity contributions are fixed amounts that do not vary based on the volume of sales. Petitioners refer to the Department's questionnaire, and argue that the Department specifically instructs that expenses such as salesmen's salaries should be categorized as indirect selling expenses. Petitioners argue that to be consistent with the clear instructions in the Department's questionnaire, the Department should re-classify expenses relating to the piazzista as indirect selling expenses.

Zaffiri maintains that the piazzista expenses are direct selling expenses. Zaffiri states that the piazzista's job, as verified by the Department, is solely to visit its small group customers. Zaffiri argues that the treatment of the piazzista expenses as direct expenses is valid, because the minuscule volume of Zaffiri's sales to its small customer group is unusual in the pasta business. Zaffiri argues that the expenses it incurs, in the form of the piazzista, are as a result of taking on this unusual class of customers. Zaffiri states that the piazzista expenses were not related to Zaffiri's other customer categories. Zaffiri states that if it did not have small-retailer sales, it would not have a piazzista, and thus, expenses relating to the piazzista are expenses which directly relate to the existence of certain sales. Therefore, Zaffiri argues, the Department should continue to accept the treatment of the piazzista expenses as direct selling expenses.

*Department's Position:* We agree with petitioners. In the Preliminary Results the Department's classification of the salary and other compensation of Zaffiri's piazzista as direct selling expenses was incorrect and should be re-classified as indirect selling expenses. Zaffiri reported that the piazzista is an employee of Zaffiri, and that the expenses of his employment do not vary according to the volume of sales. The Department's questionnaire specifically instructs that expenses such as salesmen's salaries should be categorized as indirect selling expenses. Thus, we will re-classify expenses relating to the piazzista as indirect selling expenses for these final results.

Comment 39: Treatment of the U.S. Billing Adjustment

Petitioners state that Zaffiri reported an upward billing adjustment to U.S. price, but that based on Zaffiri's questionnaire responses, petitioners believe that Zaffiri provided a credit to its customer, and not vice versa, as Zaffiri has claimed. As a result, petitioners argue that for the final results, the

Department should subtract the billing adjustments from U.S. price instead of adding them to U.S. price.

Zaffiri did not comment on this issue.

*Department's position:* We agree with petitioners. Zaffiri reported a billing adjustment to U.S. price. However, based on Zaffiri's April 23, 2003 supplemental questionnaire response at pages 49, 50, and Exhibit 17 it is clear that this adjustment should have been subtracted from the U.S. gross unit price, not added to the U.S. gross unit price as was done in the Preliminary Results. Thus, in the Preliminary Results the Department's application of billing adjustment to U.S. price was incorrect and we will subtract this adjustment from Zaffiri's U.S. gross unit price for purposes of the final results.

#### Comment 40: Treatment of Free Pasta Program in the United States

Petitioners state that Zaffiri characterizes its free pasta program in Italy as a discount, and in the United States, its free pasta program is characterized as a direct selling expense. Petitioners state that the Department's questionnaire specifically instructs respondents to report free goods as discounts, and argue that Zaffiri itself has stated on the record that it does not object to the characterization of its U.S. free pasta program as a price adjustment. Petitioners argue that the Department should treat both free pasta programs as a discount for purposes of the final results.

Zaffiri did not comment on this issue.

*Department's position:* We agree with petitioners. In the Preliminary Results the Department's classification of the free pasta program as a direct selling expense was incorrect and should be re-classified as a discount. The Department's questionnaire instructs respondents to report free goods as discounts and Zaffiri has stated that it does not object to the characterization of its U.S. free pasta as a price adjustment. Thus, the Department will treat both free pasta programs as a discount for purposes of the final results.

#### Comment 41: Currency Conversions in Computer Program

Petitioners state that Zaffiri reported the gross unit price in dollars or Euros per kilogram, and that it had added a computer field, CURRU, to report the currency in which each U.S. sale was made. According to petitioners, Zaffiri stated that dependent fields are in the same currency as the unit price. As a result, petitioners state, the Department inserted programming language into its computer program that states that if the key in the field CURRU is in Euros, then the following fields should be converted to U.S. dollars: GRSUPRU, BILLADJU, RCREDITU, PACKREVU, DIRSEL1U, DIRSEL2U, and RINDIRSU.



Petitioners argue that the Department's language is incorrect, because the language does not account for certain fields (PACKREVU and DIRSEL2U) that are always stated in Euros, which results in those fields not being converted in instances where CURRU is stated in dollars. Petitioners also argue that it is unclear whether amounts reflected in the U.S. billing adjustment and expense fields are always in the same currency reported in the CURRU field. Petitioners argue that for the final results, the Department should substitute language that will convert all fields properly, and that the Department should determine whether the amounts in the billing adjustment and expense fields are always stated in the same currency as the CURRU field.

Zaffiri agrees that the Department should substitute language to accurately convert the fields PACKREVU and DIRSEL2U from Euros to U.S. dollars with no reliance on the CURRU field.

*Department's position:* We agree with petitioners and Zaffiri. In the Preliminary Results the Department's currency exchange methodology for PACKREVU and DIRSEL2U was incorrect. Thus, the Department will substitute language to accurately convert the fields PACKREVU and DIRSEL2U from Euros to U.S. dollars with no reliance on the CURRU field as was done in the Preliminary Results.

#### Comment 42: Purchased Pasta

Zaffiri argues that the cost of purchased pasta should be included in the weighted-average COP calculated for each CONNUM. Zaffiri contends that the Department's own section D questionnaire requires respondents to report a single weighted-average COP for each CONNUM sold in the U.S. and home markets, whether produced, tolled or purchased. Furthermore, the respondent notes that this reporting requirement is compelled by precedent. In Pasta from Italy 2<sup>nd</sup> Review, La Molisana was directed to weight-average purchased and produced pasta where the pasta was commingled. Zaffiri maintains that it is common practice for pasta producers to fill product lines or make up shortfalls in product lines with purchased pasta, resulting in commingled pasta. Zaffiri adds that in previous pasta reviews, the Department included purchased pasta in its weighted-average calculation of COP. Zaffiri argues that this rule has been applied consistently since the second review. Furthermore, citing the Final Determination: Coumarin from the People's Republic of China, 59 FR 66895, 66900 (December 28, 1994) ("Coumarin from China"), Zaffiri notes that the rule of weight-averaging purchased and produced product has been applied to other cases. In Coumarin from China, the value for salicylaldehyde, an input into the production of coumarin, was based on the weighted-average of the respondent's own factors and the purchased salicylaldehyde.

Zaffiri maintains that neither respondents nor petitioners have ever questioned the propriety of weight-averaging purchased and produced pasta at any point during the past reviews nor has the Department ever suggested that this practice was erroneous. Therefore, Zaffiri claims that the Department rewrote a methodology in the Preliminary Results without articulating the reasoning behind the change. Referencing Transcom, Inc. v. United States, 123 F. Supp.2d 1372, 1380-1 (CIT 2000) among

others, Zaffiri contends that the Department cannot change an accepted policy without providing good and sufficient reason for such change. Moreover, Zaffiri argues that such changes should have been made at an earlier stage of the proceedings to provide Zaffiri with an opportunity to undertake the revisions to its costs.

Finally, Zaffiri argues that the present rule has the advantage of predictability. Zaffiri believes that this change in policy is not conducive to consistent administration of the antidumping statute. Therefore, Zaffiri urges the Department to use its COP, as originally reported, for purposes of these final results.

Petitioners state that the Department should exclude the cost of Zaffiri's purchased pasta from the weighted-average COP. Petitioners claim that this exclusion is appropriate because Zaffiri's COP should be comprised of pasta produced by Zaffiri rather than purchased from other pasta companies. Petitioners further claim that the Department's questionnaire instructed Zaffiri to not include the costs of purchasing pasta in the weighted-average cost of manufacturing where the supplier of the pasta type sold can be identified.

*Department's Position:* We agree with Zaffiri, in part. Zaffiri is correct in claiming that the questionnaire requires a single weighted-average cost for purchased and produced pasta when the sales of the pasta has been commingled. However, because Zaffiri merely purchased and resold a small amount of the finished pasta, and had its own production cost for all of the reported CONNUMs, the Department disagrees that it is appropriate to use the acquisition price to determine the cost of the purchased pasta. Instead, where produced and purchased pasta have been commingled at the time of sales, the cost of the purchased pasta should be reported at the producer's COP in order to maintain consistency with both the law and case precedent. The law specifies that the production costs of the subject merchandise, not the acquisition costs of the merchandise, be used in the antidumping duty calculation. Specifically, section 771(16)(A) of the Act defines the foreign like product as "[t]he subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise." Also, section 771(16)(B)(i) of the Act, defines merchandise as being "produced in the same country and by the same person as the subject merchandise." Finally, section 771(28) of the Act states that an exporter or producer "means the exporter of the subject merchandise, the producer of the subject merchandise, or both where appropriate." For purposes of section 773 (the normal value calculation), section 771(28) states, the term "exporter or producer" includes "both the exporter of the subject merchandise and the producer of the same subject merchandise to the extent necessary to accurately calculate the total amount incurred and realized for costs, expenses, and profits in connection with production and sale of that merchandise."

The Department has determined that it is necessary to use the producer's costs of production to accurately calculate the total costs and expenses incurred in producing subject merchandise. Furthermore, when a COP inquiry has been initiated, section 773(b)(1) of the Act clearly directs the

Department to “...determine whether, in fact, such sales were made at less than the cost of production.” An acquisition price for a finished product does not translate into a cost of production. “Cost of production,” as used in section 773(b)(1) of the Act, means the cost to produce such merchandise, not the cost of purchasing such merchandise. In the Department’s findings in Fresh and Chilled Atlantic Salmon from Norway, Final Results of Antidumping Duty Administrative Review, 61 FR 65522, 65523 (December 13, 1996) and accompanying Issues and Decision Memorandum, at Comment 1, the Department stated that when there is no transformation of the merchandise outside the scope of the order to merchandise within the scope of the order, the Department must obtain the respondent’s costs of production as well as the producer’s cost of production. See also Notice of Preliminary Determination of Sales at Less Than Fair Value: Greenhouse Tomatoes from Canada, 66 FR 51010 (October 5, 2001) and Notice of Preliminary Determination of Sales at Less Than Fair Value: Honey from Argentina, 66 FR 24108, 24112 (May 11, 2001). Although we agree that the acquisition cost of the purchased pasta was accepted in previous pasta reviews, this treatment was inconsistent with the law and with the treatment in other cases. Therefore, because Zaffiri is merely acting as a reseller of the purchased pasta, and because Zaffiri produced all of the CONNUMs and provided its own production costs for all of the CONNUMs sold in the U.S. and home market, the Department has determined Zaffiri’s CONNUM specific COP and CV by disregarding the acquisition cost of the purchased pasta and instead relying solely upon Zaffiri’s cost of producing pasta.

Comment 43: By-product revenue offset in the COGS denominator of the interest expense and G&A expense ratios

Zaffiri claims that in the Preliminary Results, the Department erred when it offset the COGS denominator of the G&A expense and interest expense ratios by the by-product revenue. Zaffiri states that there is no precedent for the Department to adjust COGS by removing scrap revenue from COGS for G&A expense purposes. Zaffiri further claims that such an adjustment would be impossible to make for countries which have hyper-inflationary economies and non-market economies. Zaffiri claims that in antidumping investigations involving those types of economies, the Department relies solely upon financial statements and therefore does not have the financial data available to make such an adjustment. Zaffiri claims that because of this, the use of a scrap revenue offset in the COGS used in the G&A and interest expense ratios penalizes Italian pasta producers under similar investigations.

Petitioners state that because the scrap revenue offset decreases direct material costs as reported by Zaffiri, direct material costs should also be net of scrap revenue in the COGS used in the G&A and interest expense ratios. Petitioners reason that the COGS denominator must be on the same basis as the reported COM. Finally, petitioners claim that Zaffiri’s comparison to the treatment of a by-product in a hyper-inflationary economy is irrelevant to the instant case.

*Department’s Position:* We agree with petitioners. The G&A and interest expense ratios must have a COGS denominator which is calculated in the same manner as the COM to which it is applied. See

Notice of Final Determination of Sales at Less Than Fair Value: Live Cattle From Canada, 64 FR 56739, 56756, (October 21, 1999) and Notice of Final Results of Antidumping Duty Administrative Review of Elemental Sulphur from Canada, 64 FR 37737, 37740, (July 13, 1999). Zaffiri's reported direct material costs in the COM are net of the scrap revenue offset, therefore, the COGS used in the denominator of the G&A and interest expense ratios must also be net of the offset. Zaffiri's comparison of this review and investigations involving high-inflationary economies and non-market economies is not relevant. In the current review, sufficient financial information is available to adjust the COGS denominator to ensure that it is on the same basis as the COM to which the G&A and interest rates will be applied. See also Department's position to Comment 23, supra.

Comment 44: Packing Cost in the COGS Denominator of the G&A and Interest Expense Ratios

Petitioners claim that overhead costs related to packing were included in the COGS of Zaffiri's G&A and interest expense ratios. Petitioners state that those costs should be subtracted from the COGS used in the G&A and interest expense ratios because the ratios are applied to a COM exclusive of all packing costs. Petitioners add that, as with the by-product revenue offset discussed above, the COGS denominator used in the G&A and interest expense ratio must be on the same basis as the reported COM.

Zaffiri did not comment on this issue.

*Department's Position:* We agree with petitioners. To determine the CONNUM-specific G&A and interest expense amounts, the G&A and interest expense ratios are multiplied by a CONNUM specific COM which does not include packing. Therefore, the COGS denominator used to calculate the G&A and interest expense ratios must also be net of packing. See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar From Korea, 67 FR 3149 (January 23, 2002) and accompanying Memorandum to Faryar Shirzad from Richard W. Moreland, Re: Issues and Decision Memorandum for the Final Determination of the Antidumping Duty Investigation: Stainless Steel Bar from Korea at Comment 9, dated January 23, 2002, where the Department removed packing from the COGS denominator used in the G&A and interest expense ratios.

Comment 45: Trade Show Revenue as Offset to G&A Expense

Zaffiri claims that a cash rebate received in 2001 relating to a trade show occurring in 2000 should be allowed as an offset for G&A expense of the POR. Zaffiri concedes that the rebate relates to the expenses of 2000, but the rebate value was unknown at the time of the preparation of the 2000 financial statements, and therefore was not booked in 2000, nor was it used to offset the reported costs of the prior POR. Nevertheless, Zaffiri claims that the rebate should be an offset to the current POR. Zaffiri states that in the Preliminary Results, the Department included in the G&A expense of the current POR, a deferred payment from prior years appearing on Tomasello's financial statements. Zaffiri

maintains that Tomasello's deferred payments are comparable to Zaffiri's revenue from the trade show in that they are from prior year(s), and therefore the trade show revenue should be included as a current G&A expense offset.

Petitioners claim that the cash received in 2001 relating to a trade show in 2000 should be used to offset the 2000 expenses which also relate to the trade show. Therefore, petitioners state that the Department should not allow it as an offset to COP for the current POR because Zaffiri should have reported it as an offset for the prior POR. Petitioners add that the Department is not compelled to treat the revenue from a trade show in the same manner as Tomasello's deferred payments because decisions should be based on the particular facts of each case. Finally, petitioners state that should the Department determine to include the trade show refund in the current POR, it should be treated as an offset to Zaffiri's home market indirect selling expenses because it is a rebate for costs associated with marketing.

*Department's Position:* We agree with petitioners, in part. Trade shows are associated with marketing and selling merchandise; therefore, the trade show cash rebate relates to indirect selling expenses, and not G&A expenses. The cash rebate Zaffiri received in 2001 is related to a trade show relates to indirect selling expenses and should not be used to offset its 2000 G&A expenses. Thus, based on the facts of this segment of this proceeding, the rebate should be applied as an offset to the home market indirect selling expenses Zaffiri reported for the POR.

#### Comment 46: Foreign Exchange Loss

Petitioners state that the foreign exchange loss arising from amounts payable should be included in Zaffiri's interest expenses because this is consistent with the Department's current practice.

Zaffiri did not comment on this issue.

*Department's Position:* We agree with petitioners. As explained in Certain Preserved Mushrooms From Indonesia: Preliminary Results of Antidumping Duty Administrative Review and Intent To Revoke Order in Part, 68 FR 11051 (March 7, 2003), we have implemented a change in practice regarding the treatment of foreign exchange gains and losses. Instead of separating the foreign exchange gains and losses, we normally will include in the financial expense calculation all foreign exchange gains and losses. This approach recognizes that the key measure is not necessarily what generated the exchange gain or loss, but rather how well the entity as a whole was able to manage its foreign currency exposure in any one currency. As such, for these final results, we included all foreign exchange gains or losses in the financial expense rate computation. Accordingly, we have revised Zaffiri's interest expense rate calculation to include all foreign exchange gains and losses. We note that there may be unusual circumstances in certain cases which may cause the Department to deviate from this general practice. We will address exceptions on a case-by-case basis.

Comment 47: Expenses on Invoice Payables and Loss on Sale of Assets

Petitioners state that invoice payables expenses and the loss on sales of assets are expenses related to the general operation of Zaffiri and should be included in the reported COP.

Zaffiri did not comment on this issue.

*Department's Position:* We agree with petitioners. The invoice payables expenses and the loss on sales of assets are recorded as expenses in Zaffiri's financial statements for 2001, and relate to the general operations of the company as a whole. We have therefore included these expenses in the G&A rate calculation.

Comment 48: Packing Costs

Petitioners state that Zaffiri's reported packing costs should be adjusted to reflect the packing costs as recorded in the trial balance. The petitioners refer to the Department's cost verification report where the Department stated that Zaffiri based the cost of packing film and packing cartons on unsupported amounts because the company could not substantiate its beginning and ending POR inventory. Therefore, petitioners claim that the Department must rely on the actual costs for packing as recorded in the trial balance.

Zaffiri maintains that its reported methodology for calculating packing costs is accurate and was verified by the Department. Zaffiri notes that it appropriately used the weight-averaged per-unit cost of packing material purchased during the POR to calculate packing cost. Zaffiri asserts that the difference between the total packing amounts reported to the Department and the total packing costs recorded in the POR trial balance was due to an increase in the ending POR inventory of packing materials. Zaffiri claims that it could not provide documentation of the inventory change because Italian GAAP only requires that an inventory count be performed once a year, which Zaffiri does at year end. Therefore, the Department should not penalize Zaffiri by not accepting its claimed ending inventory quantity and instead, relying on the total cost of packing materials as recorded in its trial balance. Zaffiri also implies that because a substantial portion of its production is tolled and comes prepackaged, the Department's methodology overstates its actual packing costs.

*Department's Position:* We agree with petitioners that based on the facts of this case, Zaffiri's packing costs should be adjusted to reflect the actual packing costs recorded in its trial balance. In the instant case, Zaffiri's normal books and records did not quantify or value its packing materials inventory at the beginning or at the end of the POR. For submission purposes, however, Zaffiri claimed that its packing materials inventory quantity increased from the beginning of the POR to the end. As a result, Zaffiri's reported packing material costs were less than those recorded in its normal books and records. Although the Department would normally factor the change in inventory into the material cost

calculation, such a change would have to be supported. Zaffiri had no documentation to support its claimed ending inventory quantity. Without such documentation, the Department has no way of verifying whether packing materials inventory, in fact, increased during the POR. The Department, however, was able to verify Zaffiri's actual packing materials costs incurred during the POR from its POR trial balance. For the Preliminary Results as a surrogate cost adjustment, the Department calculated a packing cost using the actual packing costs from the POR trial balance and did not include the unsupported claimed increase in the packing inventory during the POR. The Department reconciled the POR trial balance to Zaffiri's year end trial balance and to Zaffiri's year end financial statements. Zaffiri's characterization of the Department's computation as theoretical and imputed is incorrect. The Department used the actual costs from Zaffiri's trial balance in calculating packing costs for the POR and did not impute any theoretical costs. Furthermore, we disagree with Zaffiri's implication that the Department did not take into account the tolled pasta, which did not have packing cost, thus overstating Zaffiri's packing cost. The Department used actual packing costs incurred by Zaffiri from its POR trial balance. Only packing costs incurred by Zaffiri would be recorded in the trial balance. Packing costs incurred by outside suppliers would not be recorded in Zaffiri's trial balance or financial statements. Therefore, for the final results we have continued to include the packing costs as recorded in Zaffiri's POR trial balance.

### **Ferrara**

#### **Comment 49: Offset to Ferrara's Depreciation for Italian Subsidies**

Petitioners argue that the Department should reduce Ferrara's depreciation expense offset relating to governmental support for investment in environmentally-friendly machinery. Petitioners assert that Ferrara erred in determining the amount of the offset attributable to the POR. They contend that there are differences between the depreciation rates in Ferrara's financial statements and the rate in Ferrara's submitted costs. Petitioners urge the Department to amend the depreciation expense offset to equal the overall rate, as calculated by petitioners in their case brief, for all of Ferrara's assets. According to petitioners, such an approach is similar to the approach used by the Department in the Preliminary Results for Indalco in this review.

Ferrara counters that it correctly offset its COP by the Italian government's support for investment in environmentally-friendly machinery and equipment. Ferrara notes that while petitioners do not contest the propriety of the offset in general, petitioners do claim that Ferrara's use of a seven-year useful life for the equipment is at odds with Ferrara's financial statements. Ferrara argues that petitioners err in citing to Ferrara's 2000 financial statement footnotes because the relevant footnotes are contained in Ferrara's 2001 financial statement. Specifically, Ferrara points out that page 2 of its 2001 footnotes states that machinery and special equipment have a useful life of seven years and a depreciation rate of 14 percent. Ferrara further notes that this corresponds to the Italian original financial statement at page 56 of Exhibit 8 of its October 21, 2002, questionnaire response. Thus, Ferrara asserts that it has

properly reported this aspect of its COP and the Department should use this rate in its calculation of the value of the benefit during the POR

*Department's Position:* We agree with Ferrara. First, the offset claimed comes directly from Ferrara's 2001 year-end financial statements. It is not an amount calculated just for purposes of the response. Ferrara showed how the amount was calculated in Exhibit 7 of the supplemental section D response, and how the amount relates to one year's worth of depreciation for the associated equipment. Second, petitioners refer to pages 71 - 72 of Exhibit 8 of Ferrara's original questionnaire response. These pages are not the correct translation of the footnotes to Ferrara's financial statements (as is obvious by comparing the date of the document (on page 69 of Exhibit 8) and the numbers on page 71 - 72 with the Italian original financial statement on pages 52 and 56 of Exhibit 8.) Ferrara submitted the corrected translation of the footnotes in Exhibit 3 of its March 13, 2003, supplemental questionnaire response. The depreciation rate on page 2 of Exhibit 3 of Ferrara's March 13, 2003, response matches the depreciation rate used by Ferrara in Exhibit 7 of the supplemental section D response in calculating the depreciation against which the contribution was offset in the POR. Therefore, we have made no change to this depreciation offset.

#### Comment 50: Offset to Fixed Overhead Relating to Ferrara's Performance Bond Claim

Petitioners argue that the Department should reduce Ferrara's overhead expense offset relating to a performance bond claim because it related to equipment installed before the POR. Petitioners assert that Ferrara erred in deducting the entire amount in the period the payment was received (within the POR) as opposed to amortizing the amount over the useful life of the affected assets. Petitioners contend that this violates the matching principle whereby costs are recognized as expenses when the goods or services represented by the costs contribute to revenue (costs are matched to the revenues they help create). Petitioners argue that the same is true with reductions to cost. Petitioners further argue that because it is not possible to trace the depreciation expense associated with the machinery in question, the Department should assume the rate for the assets in question is the average of the two equipment rates listed in the financial statements.

Ferrara argues that its offset to overhead relating to the performance bond is correct. Ferrara notes that petitioners do not dispute the propriety of the reduction just that the amount should be amortized over the useful life of the equipment. Ferrara points out that if petitioners were correct, then the amortization period should be the same seven years (14 percent per year) as explained in the previous comment, and not the rates suggested by petitioners in their brief. Ferrara asserts that the rates suggested in petitioners' brief rely on the same erroneous source as petitioners cited in the previous comment. Ferrara reiterates that it is clear that Exhibit 3 of the March 13, 2003 Ferrara questionnaire response contains the correct useful life of seven years. Nonetheless, Ferrara disagrees with petitioners' suggestion that this amount should be amortized at all. Ferrara claims that the revenue was received during the POR and that the matching principle cited by petitioners requires that revenues be



recognized when received. Ferrara argues that in the case of the performance bond settlement, the revenue was received in a lump sum and was immediately available to Ferrara to use as it wished. Ferrara notes that if it chose to spend the money on equipment upgrades to bring the production lines up to specification, then the expenditure would be properly depreciated.

*Department's Position:* We agree with petitioners that Ferrara's offset related to the performance bond claim should be amortized over the useful life of the equipment. For these final results, we have used the same equipment depreciation rate used by Ferrara for the calculation of the offset to depreciation (14 percent) and applied it to the amount of the performance bond. The performance bond claim was related to equipment that was purchased and did not perform according to specification. Presumably this equipment was used during the POR and will continue to be used throughout its useful life. Therefore, the income from the performance bond claim is essentially offsetting the cost of this equipment purchased in a prior period. As such, like the equipment cost, it should be amortized over the same useful life as the equipment. In accordance with section 773(f)(1)(A) of the Act, the Department normally relies on data from a respondent's books and records where those records are prepared in accordance with the home country's GAAP, and where they reasonably reflect the costs of producing the merchandise. In this case, the income from the performance bond claim was recognized entirely in the POR as non-recurring income. However, offsetting the entire amount of the income against costs for the POR does not reasonably reflect the costs of producing the merchandise during the POR. The income reduces the cost of machinery that will be used over multiple periods and will be expensed over multiple periods, and therefore, should be allocated over the same number of periods. We have therefore applied a depreciation rate of 14 percent to amortize Ferrara's performance bond claim.

#### Comment 51: Use of "Die Type" as a Product Matching Hierarchy

Petitioners maintain that Ferrara unilaterally altered the product matching hierarchy for production process differences "die types." They assert that different die types do not result in commercially significant physical differences in subject merchandise. To support their arguments, petitioners submitted in their case brief, as an attachment, the public version of their case brief to the CIT in the appeal of the fifth review in New World Pasta Co. V. United States, Ct. No. 03-00105 (CIT brief). Petitioners urge the Department to ignore Ferrara's unilateral alteration of the definition of the "foreign like product" by including "die types" as a matching hierarchy.

Ferrara contends that petitioners' approach to this issue is unorthodox. Ferrara argues that the record for the current review is entirely different and has more augmented factual information. Ferrara urges the Department to reject petitioners' arguments for the following reasons: 1) the CIT brief constitutes an untimely submission of new factual information as this information has not been previously submitted to the Department; 2) petitioners' redaction of all proprietary information from the submitted public version of CIT brief deprives the entire brief of any grounding in factual reality, leaving a string of

abstract propositions that are untied to the factual record of the current review; and, 3) petitioners' CIT brief never cites any document or record in the present segment of the proceeding, and thus, it has no place in this review.

Furthermore, Ferrara counters that petitioners have not disputed what is on the record in this review, that Teflon die imparts a "more yellow color" and a "smoother surface" to the finished product, while bronze dies produce a rougher surface of pasta with highlights making it look white, and with minutely jagged and porous appearance which helps the sauce to stick to the pasta once it is cooked. Ferrara claims that both the color and surface are clearly "physical characteristics" of pasta. Moreover, Ferrara asserts that petitioners also have not disputed Ferrara's evidence that these physical characteristics are commercially significant as reflected in consumers' perceptions and purchases, as well as by food engineers, professional cooks and food marketers. Finally, Ferrara pointed out that the fifth CONNUM digit is needed not only to differentiate bronze- from Teflon-die pasta, it is also a methodology to avoid distortion of the dumping calculation. Specifically, Ferrara states that in the fifth review, Ferrara also used the fifth CONNUM digit to separate the Amway from non-Amway pasta, where Amway products requires much higher packaging material cost. Ferrara indicates that the Department has always accepted this position.

*Department's Position:* We agree with Ferrara with respect to using five-digit CONNUMs to account for the differences between bronze-die and Teflon-die pasta. In the fourth and fifth reviews, the Department determined that the physical and cost differences, as well as the difference in throughput rates and packing line speed, between bronze- and Teflon-die pasta warrant separate treatment. In this review, Ferrara provides further evidence showing that the differences in the color (white verses yellow) and appearance of pasta (rougher verses smoother surface) between bronze- and Teflon-die pasta are commercially significant as reflected in consumers' perceptions and purchases, as well as by food engineers, professional cooks and food marketers. Because the Department had previously verified Ferrara's questionnaire responses and this issue has been thoroughly considered in previous reviews, absent any information that contradicts our decision in the fourth and fifth reviews, we continued to accept Ferrara's reporting of five-digit CONNUMs. See Pasta from Italy 4<sup>th</sup> Review. See also, Pasta from Italy 5<sup>th</sup> Review. For purposes of model matching in these final results, we continued to use Ferrara's five-digit CONNUMs to account for the differences between bronze-die pasta and Teflon-die pasta.

With respect to Ferrara's argument that we should not address the portions of the CIT brief attached by petitioners, we note that the petitioners attachment of the argument section from its CIT brief is not a practice that the Department encourages. As a general matter, given the factual differences from one review to another, such an attachment may contain information not relevant to the review being conducted and, thus, be subject to rejection by the Department. However, with respect to this particular issue there was no new information or argument between the previous review and this review. Therefore, the Department did not reject this portion of the petitioners brief.



Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results and the final weighted-average dumping margins in the Federal Register.

Agree \_\_\_\_\_

Disagree \_\_\_\_\_

\_\_\_\_\_  
James J. Jochum  
Assistant Secretary  
for Import Administration

\_\_\_\_\_  
Date